Supreme Court, U.S.
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No.

In the Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,
Petitioner,

v.

DANIEL G. SCHMIDT III, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 1348 provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall * * * be deemed citizens of the States in which they are respectively located."

The questions presented are (i) whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which the association maintains a branch, as held by the court below, or instead has a more limited citizenship, as held by three other courts of appeals; and (ii) whether the word "located," as used in 28 U.S.C. § 1348, is ambiguous.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioner states that its parent company is Wachovia of Alabama, Inc. The parent company of Wachovia of Alabama, Inc. is Wachovia Corporation, a publicly held corporation. Wachovia Corporation indirectly holds 100% of petitioner's equity.

The parties to the proceeding in the court of appeals were Wachovia Bank, National Association; Daniel G. Schmidt, III; Priag LLC; and DGS Investments, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wachovia Bank, National Association ("Wachovia") respectfully petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 388 F.3d 414. The order of the court of appeals denying rehearing and rehearing en banc, and the accompanying dissent (App., *infra*, 57a-62a), are unreported. The opinion of the district court (App., *infra*, 47a-56a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on November 1, 2004. A timely petition for rehearing was denied on January 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(a) (1993 & Supp. 2004) provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States * * * .

28 U.S.C. § 1348 (1993 & Supp. 2004) provides:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any

such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

INTRODUCTION

This petition presents an issue on which it is imperative to have a uniform national rule: how the citizenship of national banks is to be determined for purposes of exercising federal diversity jurisdiction. A divided panel of the Fourth Circuit, construing 28 U.S.C. § 1348, held that a national bank is "located" in, and thus a citizen of, *every* state in which it maintains a branch. This holding expressly contradicts the decisions of the three other courts of appeals to have resolved the issue; disregards the clear statutory purpose of Section 1348; deprives national banks of the broad access to diversity jurisdiction enjoyed by state-chartered banks and other corporations, which may do business in a number of states but which are deemed "citizens" only of the states in which they are incorporated and in which they have their principal places of business ((see 28 U.S.C. § 1332(c)); departs from a long line of this Court's decisions holding that Congress intended Section 1348 and its statutory predecessors to provide jurisdictional parity between national banks and other corporations (including state banks); and deviates from fundamental principles of statutory interpretation reaffirmed by this Court as recently as this Term.

The Fourth Circuit's holding is wholly insupportable. Indeed, when Wachovia sought rehearing en banc before the Fourth Circuit, a substantial majority of the participating judges *favored* rehearing: of the Circuit's 13 active judges, six voted to grant the petition, while three voted against it

and four recused themselves. Rehearing thus was denied only because the Fourth Circuit's rules require the party seeking en banc review to secure the votes of a majority of judges in regular active service. Fourth Cir. R. 35. In these circumstances, review by this Court plainly is in order.

Currently pending before this Court is a petition for certiorari in *Horton* v. *Bank One, N.A.*, No. 04-989 (filed Jan. 3, 2005), seeking review of the Fifth Circuit's holding that a national bank is *not* a citizen of every state in which the bank has a branch. See *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir. Oct. 5, 2004). Should the Court grant the petition for certiorari now pending in *Horton*, Wachovia submits that the Court should also grant the instant petition and consolidate this case with *Horton* pursuant to Rule 27.3. Unlike the Fifth Circuit in *Horton*, the Fourth Circuit in this case endorsed an approach to statutory construction that looks principally to dictionary definitions—to the exclusion of the statutory structure, purpose, and evolution—in determining the meaning of the statute's terms. That approach cannot be reconciled with the fundamental principles of statutory interpretation this Court recently reaffirmed in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, ___ U.S. ___, 125 S. Ct. 460 (2004). Granting review in this case and consolidating it with *Horton* would allow the Court to address directly the important and recurring issue posed by the Fourth Circuit's technique for analyzing statutory text.

STATEMENT

Wachovia commenced this action by filing a petition to compel arbitration in the United States District Court for the District of South Carolina. Wachovia is a national banking association with its main office in Charlotte, North Carolina. Respondents are all citizens of South Carolina. Accordingly, Wachovia asserted in its petition that the district court possessed diversity jurisdiction over the action pursuant to 28 U.S.C. § 1332. It is undisputed that, if Wachovia were a state

bank (or, for that matter, any corporate entity other than a national bank), diversity jurisdiction would exist.

The district court assumed jurisdiction over the action but dismissed Wachovia's petition on the merits, ruling that respondents were under no obligation to arbitrate their claims. Wachovia timely appealed that ruling to the United States Court of Appeals for the Fourth Circuit. Respondents challenged the district court's subject matter jurisdiction before the court of appeals. The basis for respondent's challenge was that, pursuant to Section 1348, Wachovia is "located" in, and thus a citizen of, *every* state in which it maintains a branch. Wachovia maintains branches in South Carolina, the state where respondents are citizens. Therefore, respondents contended, the federal courts lack diversity jurisdiction over Wachovia's petition to compel arbitration.

Ultimately, over a vigorous dissent by Judge King, the court of appeals construed Section 1348 to mean that Wachovia is a citizen of every state in which it maintains a branch, declaring that to be the statute's "unambiguous" meaning. The Fourth Circuit acknowledged that the three other circuit courts to have ruled on the question had reached the opposite conclusion, but it dismissed these contrary rulings, observing:

> [Q]uestions of statutory interpretation are not decided by majority vote of the courts of appeals, and bare citations to decisions by other courts cannot substitute for analysis. * * * That our sister circuits may disagree with us in any given case is significant only insofar as their reasoning is persuasive. Here, that reasoning is simply unconvincing.

App., *infra*, 30a-31a (citations omitted).

Having concluded that diversity jurisdiction is lacking, the court of appeals vacated the district court's ruling and ordered the case dismissed. Wachovia timely petitioned the court of appeals for rehearing and for rehearing *en banc*, but

the petition was denied, even though a majority of the judges who actually voted on the petition favored granting it. App., *infra*, 57a-58a.

While Wachovia's petition for rehearing was pending, the Office of the Comptroller of the Currency secured leave to file an *amicus curiae* brief in support of the petition. App., *infra*, 65a-78a. Asserting in its brief that "the question of a national bank's citizenship for purposes of diversity jurisdiction raises an issue of exceptional importance" (*id.* at 67a), the Comptroller urged the court of appeals to hold—consistently with the other three circuits that had squarely addressed the issue—that a national bank is *not* a citizen of every state in which it maintains a branch.

REASONS FOR GRANTING THE PETITION

At least three compelling reasons support the grant of certiorari in this action. First, and without dispute, the court of appeals' decision has created an irreconcilable circuit conflict on a jurisdictional issue of great legal and practical significance; this is a question on which it is utterly untenable to have conflicting rules in the various circuits, since both plaintiffs and national banks (depending on who sues first) can manipulate jurisdiction by selecting a forum friendly to their interests. Second, the court of appeals' holding is at odds with a number of decisions of this Court that have construed Section 1348 and its predecessors to maintain jurisdictional parity between national banks and other corporations. Finally, using a mode of analysis that cannot be reconciled with this Court's opinion in *Koons*, 125 S. Ct. 460, the court of appeals failed to acknowledge the ambiguity of the term "located" in Section 1348, thereby ignoring the statute's broader context and frustrating Congress's ultimate legislative purpose. The Court should grant review to correct the Fourth Circuit's errors on these points.

I. THE COURTS ARE DIVIDED ON THE SIGNIFICANT QUESTION WHETHER A NATIONAL BANK IS DEEMED A CITIZEN OF EVERY STATE IN WHICH IT MAINTAINS A BRANCH.

A. This Case Squarely Presents A Direct Conflict Among The Courts Of Appeals.

As the Fourth Circuit specifically acknowledged (App., *infra*, 5a), its ruling has created an irreconcilable conflict among the courts of appeals. The Fourth Circuit has ruled that a national bank is "located" in every state in which it has a branch. The Fifth and Seventh Circuits, on the other hand, have held that a national bank is "located" in—and therefore is a citizen of—only the state where it maintains its principal place of business and the state named in the bank's organization certificate.[1] See *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982 (7th Cir. 2001); *Horton*, 387 F.3d 426. Likewise, construing the immediate predecessor to Section 1348, the Ninth Circuit concluded that a national bank should not be deemed a citizen of every state in which it has a branch. *American Surety Co.* v. *Bank of California*, 133 F.2d 160 (9th Cir. 1943).[2] As evidenced by a public Interpretive Letter and the *amicus curiae* brief that it filed in this case, the Comptroller of the Currency is likewise of the view that "[n]ational banks are to be treated for diversity jurisdiction purposes in a manner similar to state banks." O.C.C. Inter. Ltr. 952 (Oct. 2002), 2003 WL 23221430, at *4; App., *infra*, 65a-78a. Accordingly, the Comptroller supports the holdings of the Fifth, Seventh and Ninth Circuits, advocating an interpretation of Section 1348 that does not deem a national bank to be a citizen of each State in which it maintains a branch. *Id.*

[1] The *Horton* Court held that a national bank is also a citizen of the state named in its articles of association—a distinction without a difference under the circumstances of that case. 387 F.3d at 431 n.26.

[2] The Second Circuit has considered this issue in two cases, but has not squarely decided it. See *United Republic Ins. Co.* v. *Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (remanding case to district court to determine whether diversity jurisdiction existed under 28 U.S.C. § 1348); *World Trade Ctr. Props., L.L.C.* v. *Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) (suggesting, in *dictum*, that a national bank is deemed by 28 U.S.C. § 1348 "to be a citizen of every state in which it has offices").

The district courts within the circuits that have not squarely addressed Section 1348 are also deeply divided. Considering the circuit split alongside the division among district courts since 1992, a picture of confusion and uncertainty emerges for litigants across the country.[3]

Not only are the circuit courts split on the ultimate interpretation of "located" in Section 1348, they are divided as to the application of the principal tools that courts use to determine statutory meaning. The Fourth Circuit, for example,

[3] Compare *RDC Funding Corp.* v. *Wachovia Bank, N.A.*, 2004 WL 717111 (D. Conn. Mar. 31, 2004) (unpublished opinion); *Adams* v. *Bank of Am., N.A.*, 317 F. Supp. 2d 935, 941-42 (S.D. Iowa 2004); *MBIA Ins. Corp.* v. *Royal Indem. Co.*, 294 F. Supp. 2d 606 (D. Del. 2003); *Carl* v. *Republic Sec. Bank*, 282 F. Supp. 2d 1358, 1364 n.1 (S.D. Fla.), appeal dismissed, 2003 WL 22172202 (11th Cir. Aug. 5, 2003); *Evergreen Forest Prods. of Ga., LLC* v. *Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1307 (M.D. Ala. 2003); *Bank of Am., N.A.* v. *Johnson*, 186 F. Supp. 2d 1182, 1183 (W.D. Okla. 2001); and *Financial Software Sys.* v. *First Union Nat'l Bank*, 84 F. Supp. 2d 594, 601 (E.D. Pa. 1999) (all concluding national bank is not a citizen of every state in which it maintains a branch) with *Frontier Ins. Co.* v. *MTN Owner Trust*, 111 F. Supp. 2d 376, 379-80 (S.D.N.Y. 2000); *Ferraiolo Constr., Inc.* v. *Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997); *Norwest Bank Minn., N.A.* v. *Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996); *Bank of New York* v. *Bank of Am.*, 861 F. Supp. 225, 231 (S.D.N.Y. 1994); and *Connecticut Nat'l Bank* v. *Iacono*, 785 F. Supp. 30 (D.R.I. 1992) (all holding national bank is a citizen of every state in which it has a branch).

rested its decision primarily on its assumption that the word "located" is plain and unambiguous, requiring no resort to extra-textual interpretive aids. App., *infra*, 4a-7a. The Fifth and Seventh Circuits, on the other hand, heeding this Court's admonition that "there is no enduring rigidity about the word 'located'" (*Citizens & S. Nat'l Bank* v. *Bougas*, 434 U.S. 35 (1977)), concluded that the term *is* ambiguous. *Faul*, 253 F.3d at 987-88; *Horton*, 387 F.3d at 429. Consequently, both the Fifth and Seventh Circuits considered it important to analyze Section 1348's statutory and jurisprudential history, which both courts construed as requiring the maintenance of jurisdictional parity between national banks and other corporations. *Faul*, 253 F.3d at 988; *Horton*, 387 F.3d at 431. The Fourth Circuit, analyzing the same sources, concluded that they evidenced a "progressive[]" *retreat* from parity. App., *infra*, 24a-25a (emphasis in original).

Finally, the circuits also differ on the relevance of *Bougas*, 434 U.S. 35, a decision of this Court that interpreted the word "located" in a former version of the national bank venue statute. The Seventh Circuit, noting that this Court had expressly limited its holding in *Bougas* to the venue statute at issue in that case, refused to apply *Bougas*'s definition of "located" to Section 1348. *Faul*, 253 F.3d at 989. Explaining the fundamental distinction between venue and jurisdiction in the federal courts, the Seventh Circuit observed that "[w]e have previously counseled against relying on interpretations of venue provisions to discern the meaning of jurisdictional statutes." *Id.* at 991. The Fourth Circuit, by contrast, minimized the distinction between venue and jurisdiction and, invoking the *in pari materia* doctrine, applied *Bougas*'s definition of "located" to Section 1348. App., *infra*, 13a-17a.

In short, the divide between the circuits on the interpretation of Section 1348 is deep—as to both reasoning and result. That divide has generated a series of thoroughly reasoned and comprehensive opinions (and, in this case, a lengthy and well-reasoned dissent) that makes the question presented by

this petition ripe for consideration by this Court. Because the court below created the conflict by addressing, and repudiating, the analyses of the Seventh and Fifth Circuits, granting review in both this case and in *Horton* would allow for the fullest presentation of the issues to this Court.

B. The Circuit Conflict Involves A Recurring Issue Of Great Practical Importance.

The jurisdictional question presented by this petition is not merely academic, but is of great practical significance, for many national banks are multi-state operations that maintain branches in several judicial circuits. Wachovia, for example, has branches in sixteen states,[4] including four of the five states in the Fourth Circuit, two states in the Fifth Circuit, and states in five other circuits. See FDIC Institution Directory, http://www2.fdic.gov/idasp/main.asp (last visited Feb. 27, 2005) (providing demographic information about federally-insured institutions, current as of Feb. 23, 2005). As a result of the court of appeals' holding in this case, Wachovia is assured of diversity jurisdiction in the Fifth Circuit but is limited to other bases for jurisdiction in the Fourth Circuit (where it is headquartered). And given the uncertainty engendered by the existing circuit split, Wachovia's ability to invoke diversity jurisdiction in the remaining circuits where it operates branches cannot be reliably predicted.

Wachovia is far from the only victim of the "immediate injury" and "disruptive consequences" (App., *infra*, 59a, 61a-62a (King, J., dissenting)) created by the Fourth Circuit's ruling. One hundred sixty-one national banks operate interstate branches. See FDIC Institution Directory, *supra*. Of those national banks, over thirty maintain at least one branch in the Fourth Circuit. See *id.* The largest national bank in the coun-

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[4] For purposes of this discussion, and as is the case for diversity jurisdiction analysis, Wachovia refers to the District of Columbia as a state. 28 U.S.C. § 1332(d).

try, Bank of America, N.A., maintains its headquarters in North Carolina and operates branches in thirty states, and thus would be deemed a citizen of each of those states under the Fourth Circuit's ruling. See *id*. For the moment, then, accidents of geography, rather than uniform jurisdictional principles, control the doors of the federal courthouse.[5]

Moreover, the existing circuit split prevents national banks from being able consistently to shield themselves from potential local bias in diversity actions by exercising a right of removal to federal court under 28 U.S.C. § 1441. Though this right remains available to national banks in the Fifth, Seventh and Ninth Circuits, it is unavailable in the Fourth Circuit and is in doubt in the remaining circuits. Because plaintiffs (including banks themselves when they initiate an action) possess the right to select the forum in the first instance, the circuit split is a prescription for forum shopping that should not be permitted to persist.

This Court has described rules governing federal subject matter jurisdiction as being so important that appellate courts have a "special obligation" to satisfy themselves of jurisdiction in every case. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Indeed, the Court has not hesitated to act to correct the disruption caused by the inconsistent application of subject matter jurisdiction principles. *E.g.*, *Roche* v. *Lincoln Prop. Co.*, 373 F.3d 610 (4th Cir. 2004), cert

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[5] The Fourth Circuit's decision has already caused courts to dismiss or hold in abeyance a number of pending actions in which jurisdiction has been based solely on diversity of citizenship, resulting in significant disruption, judicial inefficiency, and expense. See, *e.g.*, *Coots* v. *Wachovia Bank, N.A.*, 8:03-CV-00705 (D. Md. Feb. 11, 2005) (memorandum opinion) (App., *infra*, 63a-64a); *Nat'l Union Fire Ins. Co.* v. *Mfrs. and Traders Trust Co.*, No. 03-2276 (4th Cir. Jan. 28, 2005); *Friel Prosthetics, Inc.* v. *Bank of America, N.A.*, 2005 WL 348263 (D. Md. Feb. 9, 2005); *Stewart* v. *Bank of America, NA*, No. DKC 2004-2482 (D. Md. Feb. 9, 2005).

granted, 73 U.S.L.W. 3338 (U.S. Feb. 28, 2005) (No. 04-712); *Carden* v. *Arkoma Assoc.*, 490 U.S. 1045 (1989) (granting certiorari to resolve circuit split as to rule of citizenship of limited partnerships for purposes of diversity jurisdiction); *Peacock* v. *Thomas*, 514 U.S. 1126 (1995) (granting certiorari to resolve circuit split as to ancillary jurisdiction). Petitioner respectfully submits that the Court should act similarly here.

II. THE DECISION BELOW DISREGARDS HOLDINGS OF THIS COURT THAT 28 U.S.C. § 1348 AND ITS STATUTORY PREDECESSORS WERE INTENDED TO MAINTAIN JURISDICTIONAL PARITY BETWEEN NATIONAL BANKS AND OTHER CORPORATIONS.

The Fifth and Seventh Circuits rested their decisions that national banks are not citizens of all states in which they maintain branches largely on a series of decisions from this Court holding that Section 1348 and its predecessors were intended to further Congress's goal of maintaining jurisdictional parity between national banks and other corporations. The Fourth Circuit, as noted above, rejected both the holdings of the Fifth and Seventh Circuits and their construction of relevant authority from this Court. Such apparent disregard of this Court's decisions offers a separate and independent basis for granting certiorari in this action.

Section 1348 has its roots in the National Bank Act of 1863, which provided that any suit by or against a national bank could be brought in federal court. See 12 Stat. 665, 681 (1863). In 1882, however, Congress eliminated general federal question jurisdiction for suits involving national banks, while preserving diversity jurisdiction and parity in the treatment of national and state banks. See 22 Stat. 162, 163

(1882) (the "1882 Act").[6] This Court soon held that the 1882 Act was intended "to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs. Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780 (1887).

In 1887, Congress modified the 1882 Act, inserting the language that appears in the current 28 U.S.C. § 1348 and that is at issue here: "That all national banking associations * * * shall * * * be deemed citizens of the states in which they are respectively located[.]" 24 Stat. 552 (the "1887 Act"); see also 25 Stat. 433 (1888) (correcting the text of the 1887 Act). This Court confirmed, in *Petri* v. *Commercial National Bank of Chicago*, 142 U.S. 644, 651 (1895), that Congress intended the 1887 Act to have the "same effect and operation" as the 1882 Act: to eliminate general federal question jurisdiction over national banks, while preserving diversity jurisdiction over such banks to the same extent that such jurisdiction could be exercised over state corporations and individuals. Indeed, the *Petri* Court observed that "[n]o reason is perceived why it should be held that congress [*sic*] intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Id.*

In 1911, Congress amended the 1887 Act and incorporated it into the Judicial Code. 36 Stat. 1091 (1911). This Court considered the 1911 amendment in 1915 and ruled that

[6] The 1882 Act provided: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations * * * shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun[.]" 22 Stat. 162, 163 (1882).

it was not intended to effect any substantive change in the law. *Herrmann* v. *Edwards*, 238 U.S. 107, 118 (1915). Rather, the Court later observed, the 1911 version of the Judicial Code was merely a "continuation [] of existing statutes, and no change of intent is to be implied unless clearly manifest." *Federal Intermediate Credit Bank at Columbia, S.C.* v. *Mitchell*, 277 U.S. 213, 216 (1928) (explaining holding of *Herrmann*).

Finally, in 1948—three years after the Ninth Circuit's holding in *American Surety* that national banks are *not* citizens of all states in which they maintain branches—Congress recodified the language now appearing in Section 1348 without substantive change. In 1963, this Court restated *Petri*'s longstanding interpretation of Section 1348's statutory predecessor, remarking that "Section 4 [of the 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." *Mercantile Nat'l Bk. of Dallas* v. *Langdeau*, 371 U.S. 555, 565-66 (1963). Congress has not amended the text of Section 1348 since 1948.

As this Court repeatedly acknowledged in *Cooper, Petri, Herrmann*, and *Langdeau*, then, the history of Section 1348 reflects Congress's consistent intention to maintain jurisdictional parity between national banks on the one hand, and state banks and other corporations on the other. In this case, however, the court of appeals failed to acknowledge this intention, instead characterizing the post-1882 changes to the national bank jurisdictional statute as a "progressive[]" *retreat* from parity. App., *infra*, 25a.

This misconstruction of the relevant statutory history rests on a number of fundamental errors. First, the court of appeals misread the significance of the change in text from the 1882 Act to the 1887 Act (App., *infra*, 24a), disregarding the *Petri* Court's conclusion that the two acts were intended

to further the same fundamental *purpose* of jurisdictional parity. See *Petri*, 142 U.S. at 651. Second, the court of appeals placed great emphasis on the deletion of what it characterized as a "clarifying clause about jurisdictional parity"—a deletion that the court believed to have occurred in the 1948 recodification of the statute. App., *infra*, 24a-25a.[7] Yet this Court has twice considered the deletion (which occurred in 1911, not, as the court of appeals assumed, in 1948) and concluded that it was not intended to change the meaning of the statute in any respect. *Mitchell*, 277 U.S. at 216 (explaining holding of *Herrmann*, 238 U.S. 107, that "no change of intent is to be implied unless clearly manifest"). The court of appeals' opinion does not cite *Herrmann* or *Mitchell*, an oversight that goes a long way toward explaining its misconstruction of the relevant statutory history.

In short, the several errors committed by the court of appeals led it to disregard this Court's settled teaching on the purpose of Section 1348 and its statutory predecessors. This Court should grant certiorari to reaffirm its longstanding instruction that those statutes were intended to further Congress's goal of maintaining jurisdictional parity between national banks and other corporations.

III. THE COURT OF APPEALS' INTERPRETATION OF 28 U.S.C. § 1348 OVERLOOKS THE BROADER CONTEXT AND FUNCTION OF THE STATUTE AND FRUSTRATES CONGRESS'S PURPOSE OF MAINTAINING THE COMPETITIVE EQUALITY OF NATIONAL BANKS.

Finally, the Fourth Circuit's error transcends its particular misreading of Section 1348. Just this Term, this Court reaffirmed that "[s]tatutory construction is a 'holistic endeavor'"

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[7] The deleted clause provided: "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."

(*Koons*, 125 S. Ct. at 466-67) and that a statute must be examined within the context of its broader legislative scheme. *Id.*; see also *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (noting that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). The court of appeals, however, without considering the broader statutory scheme of Section 1348, simply assumed that the word "located" is unambiguous. In doing so, the court relied heavily on dictionary definitions of "located," giving exceedingly short shrift to the broader context of the statute to determine whether an ambiguity existed. If not corrected by this Court, the Fourth Circuit's method of statutory analysis will lead that court into repeated error.

As the Fifth and Seventh Circuits and the dissent below recognized, the word "located" bears no fixed and unambiguous meaning. *Horton*, 387 F.3d at 429; *Faul*, 253 F.3d at 987-88; App., *infra*, 35a-36a (King, J., dissenting). Indeed, when analyzed alongside other provisions of the United States Code dealing with national banks (as *Koons* and other precedent from this Court commands), the ambiguity of the term in Section 1348 becomes apparent. In some statutes, Congress has used the word in a way that presumes a national bank can be "located" only in a single place. *E.g.*, 28 U.S.C. §§ 52, 75, 1394 (1993 & Supp. 2004). In other statutes, however, Congress has used the word in a way that presumes that a national bank has multiple "locations." *E.g.*, 12 U.S.C. §§ 36, 92 (2001 & Supp. 2004). The Fourth Circuit majority ultimately acknowledged these inconsistent definitions, but only after assuming that "located," as used in Section 1348, is unambiguous. App., *infra*, 19a-20a.

As already noted, the court of appeals made a number of errors in construing the statutory history of Section 1348. Perhaps because of its reflexive and strongly-expressed perception that "located" is unambiguous, the court of appeals

made similarly fundamental errors in brushing aside the history of interstate branch banking by national banks—errors that caused it to misconstrue Congress's purpose in enacting Section 1348. Until 1927, federal law did not permit national banks to have any branches at all. See *Bougas*, 434 U.S. at 42-43. That year, however, and again in 1933, Congress responded to an explosion in intrastate branching on the part of state banks by allowing national banks, which then generally operated from only a single location, to operate branches within the same state, but only to the extent that state law afforded state banks the same prerogative. McFadden Act, ch. 191, 44 Stat. 1224 (1927), and as amended by Act of June 16, 1933, ch. 89, 48 Stat. 184; see *First Nat'l Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257-61 (1966) (describing legislative history of 1927 and 1933 intrastate branching acts). This Court has described this legislative action as illustrating Congress's intention "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Id.* at 261.

The McFadden Act did not allow national banks to have *inter*state branches. See *Northeast Bancorp, Inc.* v. *Board of Gov. of the Fed. Reserve Sys.*, 472 U.S. 159, 169 (1985) (observing that "interstate branch banking was * * * prohibited by the McFadden Act"). It was not until 1994 that Congress, again in an effort to keep national banks competitive with state banks, allowed national banks to establish new interstate branch locations by passing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. S. Rep. No. 103-240, at 5 (1994) (explaining history of interstate branching); Stacy Stritzel, *The Riegle-Neal Interstate Banking and Branching Act of 1994: Progress Toward a New Era in Financial Services Regulation*, 46 SYRACUSE L. REV. 161 (1995). The court of appeals, however, mistakenly assumed that Congress had allowed interstate branch banking by national banks in the McFadden Act of 1927. App., *infra*, 12a. Consequently, the court of appeals reasoned that Congress

must have had interstate bank branches in mind when it recodified Section 1348 in 1948, and therefore must have believed national banks to be located wherever such branches are present.[8] *Id.*

Largely because of its misinterpretation of the history of interstate branch banking, the court of appeals' decision compels the following paradoxical conclusion: although Congress has acted to keep national banks competitive by dramatically expanding their ability to open branches across state lines, it has—at the same time—significantly curtailed national banks' ability to invoke diversity jurisdiction by making them citizens of every state in which they maintain a branch. This conclusion becomes all the more baffling when one recognizes that, over the past several decades, Congress has resisted calls to limit the scope of diversity jurisdiction by making corporations citizens of every state in which they do business. See Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291, 294-95 (1987) (describing failed legislative efforts to restrict diversity jurisdiction).

Koons, 125 S. Ct. 460, offers sound guidance to end the paradox created by the court of appeals' decision. There, this Court considered the broad context of a statute, found a textual ambiguity in light of that context, and proceeded to resolve the ambiguity by exploring relevant legislative history

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[8] To be sure, the small handful of interstate branches existing at the time the McFadden Act was passed, which had been allowed under the laws of a few states, continued to operate. See Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Small to Serve? The Potential Risks of National Banks*, 77 IOWA L. REV. 957, 962 n.10 (1992). One cannot reasonably conclude, however, that the existence of a few "grandfathered" interstate branches in 1948 indicates that Congress intended to upset settled jurisprudence when recodifying Section 1348 in that year.

and invoking "common sense" to determine the intention of Congress and the statute's meaning. It is this same "common sense," contextual approach that is called for here. As the Fifth and Seventh Circuits have recognized, the ambiguity in Section 1348 can be resolved only by looking to the broader statutory and jurisprudential history. Nothing in that history suggests that, when Congress made interstate branch banking possible, it simultaneously intended to reverse its longstanding policy of maintaining jurisdictional parity between national and state banks. Thus, review of the Fourth Circuit's decision offers this Court an opportunity to explain further its approach to statutory interpretation—one that carefully considers the broad context of a statute when identifying and resolving textual ambiguity.

* * *

Against this background, if the Court grants certiorari in *Horton*, it also would be appropriate for it to grant review of this petition and to consolidate the cases. After all, the decision below is the one that created the conflict among the courts of appeals in the first place. Moreover, this case more directly presents the broader question of how to determine whether a statutory term is ambiguous. Consideration of this case accordingly would allow for the fullest presentation of issues to the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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United States Court of Appeals,
Fourth Circuit.

WACHOVIA BANK, NATIONAL ASSOCIATION,
Plaintiff-Appellant,

v.

DANIEL G. SCHMIDT III; PRIAG LLC;
DGS INVESTMENTS, INC.,
Defendants-Appellees.

No. 03-2061.

Argued: June 3, 2004.
Decided: Nov. 1, 2004.

Before LUTTIG and KING, Circuit Judges, and Robert R. BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Vacated and remanded by published opinion. Judge LUTTIG wrote the opinion, in which Senior Judge BEEZER joined. Judge KING wrote a dissenting opinion.

OPINION

LUTTIG, Circuit Judge:

Appellant Wachovia Bank, a national banking association with its principal place of business in North Carolina, appeals from the district court's denial of its petition to compel arbitration of claims that appellee Daniel G. Schmidt III brought against Wachovia in state court. On appeal, Schmidt argues for the first time that the district court lacked diversity jurisdiction to entertain Wachovia's petition because Wachovia operates branch offices in South Carolina, the state of which Schmidt is a resident. We must therefore decide whether a national banking association is, within the meaning of 28 U.S.C. § 1348, "located" in a state in which the banking association operates branch offices, and therefore a citizen of

that state for purposes of diversity jurisdiction. Because we conclude that a national bank is located where it operates branch offices, we vacate the judgment of the district court and remand with instructions to dismiss for lack of jurisdiction.

I.

Appellant Wachovia Bank ("Wachovia") is a national banking association with its principal place of business in Charlotte, North Carolina. *Appellant's Supp. Br.* at 1. Wachovia operates branch offices in a number of other states, including South Carolina. *Id.* Appellee Daniel G. Schmidt III ("Schmidt") is a citizen of South Carolina. J.A. 114.

On April 10, 2003, Schmidt and other plaintiffs filed a complaint in South Carolina state court, naming Wachovia and others as defendants. J.A. 117. The complaint alleged, *inter alia*, that the defendants fraudulently induced the plaintiffs to engage in a risky tax-motivated investment scheme. J.A. 146-48. On June 18, Wachovia filed a petition in the United States District Court in South Carolina seeking an order compelling arbitration and a motion to compel arbitration of the state claims, naming Schmidt and related business entities as defendants. J.A. 113. As the sole basis of jurisdiction, Wachovia's petition invoked the diversity jurisdiction of the district court under 28 U.S.C. § 1332. J.A. 114.

The district court denied Wachovia's petition and motion, without addressing its subject matter jurisdiction, J.A. 380-90, and Wachovia appealed. For the first time, Schmidt argues before us that diversity is lacking because Wachovia is "located" in South Carolina, within the meaning of 28 U.S.C. § 1348.

II.

Section 1348 of title 28 of the United States Code provides in full:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association *established* in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed *citizens of the States in which they are respectively located*.

28 U.S.C. § 1348 (emphases added).

Schmidt contends that Wachovia, which operates branch offices in South Carolina, is "located" in that state, and that the district court therefore lacked jurisdiction. We agree. Three traditional tools of statutory interpretation in combination — the ordinary meaning of "located," its use in juxtaposition with the contrasting term "established" in the immediately preceding sentence in section 1348, and the Supreme Court's construction of "located" in a parallel venue statute in *Citizens and Southern National Bank v. Bougas*, 434 U.S. 35 (1977) — confirm that "located" should be construed so as to render banking associations citizens of the states in which they operate branch offices.

A.

It is an axiom of statutory interpretation that the plain meaning of an unambiguous statute governs, barring exceptional circumstances. *See, e.g., Rubin v. United States*, 449 U.S. 424, 430 (1981). Where, as here, the statute does not provide an express definition for the term in question, "we construe [the] statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

In ordinary parlance, the word "located" is a general term referring to physical presence in a place. *See, e.g., Webster's Third New International Dictionary* 1327 (1993) (defining "locate" as "to set or establish in a particular spot or position," and "location" as "a position or site occupied or available for occupancy"); *Black's Law Dictionary* 958 (8th ed.2004) (defining "location" as [t]he specific place or position of a person or thing"). This was equally true in 1948, when section 1348 was enacted, and in 1887, when the phrase "citizens of the States in which they are respectively located" was first added to the predecessor statute to section 1348, *see* Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554-55 ("the 1887 Act"). *See, e.g., Black's Law Dictionary* 1089 (4th ed. 1968) (defining "location" as "site or place"); 8 *Oxford English Dictionary* 1081 (2d ed. 1989) (defining "locate" as "[t]o fix or establish in a place; to settle; *pass.* to be settled, stationed, or situated," and providing examples of usage from 1807 through 1896 that universally involve physical presence in a place). Moreover, the sixth edition of *Black's Law Dictionary*, one of the few sources to consider the past participle "located" separately as a general legal term, emphasized the connotation of *physical* presence. *See Black's Law Dictionary* 940 (6th ed. 1990) (defining "located" separately as "[h]aving *physical presence* or existence in a place" (emphasis added)). Accordingly, the ordinary meaning of "located" suggests that a national bank is "located" wherever it has physical presence.

It is indisputable that a national banking association becomes physically present in a state when it opens branch offices in that state and conducts business there. *See, e.g.*, 12 U.S.C. § 92 (authorizing any national bank "*located and doing business* in any place the population of which does not exceed five thousand inhabitants" to operate as an insurance agent (emphasis added)). It follows that, within the ordinary meaning of "located," a national banking association is "located" wherever it operates branch offices. Indeed, the ordinary meaning of "located" so naturally includes branch offices that a unanimous panel of the Second Circuit commented that section 1348 includes branch offices, without seeing any need for further analysis. *See World Trade Center Properties, LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) ("Defendant Wells Fargo is a national bank . . . and by statute is deemed to be a citizen of *every state in which it has offices*." (emphasis added) (citing 28 U.S.C. § 1348)); *see also United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 169-70 (2d Cir. 2003) (per curiam) (remanding to the district court to determine whether diversity jurisdiction existed in light of the fact that the defendant bank operated offices in the plaintiff's state).

The Seventh Circuit has come to a contrary conclusion, holding that "located" in section 1348 refers only to a bank's *principal* office and the office listed in its organization certificate. *See Firstar Bank v. Faul*, 253 F.3d 982, 993-94 (7th Cir. 2001); *see also Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004) (adopting the same result on similar reasoning). While the Seventh Circuit's holding rests largely upon a purposive, historical analysis of the statute, which we address below, *see infra*, it also suggests that the word "located" is ambiguous as between any physical presence and a single, *unique* physical presence. *See id.* at 987 ("[W]hat we are trying to determine is the number or scope of places where a national bank is fixed or established. Some definitions do suggest that 'locate' refers to a particular or specific location."). But this supposed ambiguity is not found in the *ordinary* meaning of "located." Although the definitions cited by the Seventh Circuit (and us) do refer to a "particular or specific location," *see id.* (quoting *Webster's Third* at 1327), they do not include any requirement that the "particular or specific location" be *unique* or exclude *other* distinct locations. Nothing in these definitions suggests that an extended

entity like a national banking association cannot occupy, and thus be "located," in multiple "particular or specific locations" at once. In fact, given that "locate" referred to tracts of land in one of its original applications, *see* 8 *Oxford English Dictionary* at 1081 (defining "locate" as [t]o appoint the place or situation of (the lands referred to in a grant)" and citing usage from 1765 through 1780); *cf. Webster's Third* at 1327 (defining "location" as "an area or tract of land"), it would be odd to restrict the term's application to a *unique* site in the case of other extended entities. A tract of land that stretches across the border of North and South Carolina is "located" in *both* states, not just North Carolina. Likewise is a national bank with its principal office in North Carolina and branch offices in South Carolina "located" in both states.

In light of these definitions, the dissent's conclusion that the word "located" is ambiguous is puzzling. In maintaining that the term "located" is ambiguous, the dissent cites four definitions, all of which establish that "located" refers to a specific place or position. *See post* at 434 & n.2 (citing definitions that define "located" in terms of "specific place or position," "a particular spot or position," "site or place," and "fix or establish in a place"). But the dissent plainly does not attempt to defend the erroneous inference that the Seventh Circuit drew, namely that the *specificity* of the position connoted by "located" implies *uniqueness* of that position; the dissent openly concedes that the word "located" *could* encompass multiple branch offices in multiple states. *See post* at 434 ("In this proceeding, 'located' could refer . . . to any state in which Wachovia has established branch offices."). Thus, every definition the dissent cites supports our conclusion that the word "located" unambiguously includes branch offices, because branch offices plainly have a "specific place or position," are clearly located in a "particular spot or position," and are certainly "fixed or established in a site or place." *See post* at 434 & n.2. Because the dissent cites only

definitions that clearly support our interpretation of the word "located," we are at a loss as to how to address its entirely unsupported conclusion that the word is *ambiguous* with respect to branch offices.

B.

The Supreme Court's decision in *Citizens and Southern National Bank v. Bougas*, 434 U.S. 35 (1977), gives authoritative support to our reliance on the ordinary meaning of "located" in section 1348. In *Bougas*, the Supreme Court interpreted "located" in the former venue statute for national banking associations to include branch offices. *Id.* at 37. *Bougas* must control our interpretation of "located" in the parallel jurisdiction statute for national banks for two reasons: first, in a statutory context almost *identical* to section 1348, the *Bougas* Court applied the canon that different statutory terms in the same section (as those appearing in section 1348, *see* discussion *infra*) should be given different meanings; and second, the venue and jurisdiction statutes should be treated as *in pari materia*, so that the Supreme Court's construction of a term in one statute must control the meaning of the identical term in the other.

i.

It is a principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible. *See, e.g., Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001) ("The use of different terms within related statutes generally implies that different meanings were intended." (quoting 2A Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 46.06, at 194 (6th ed. 2000))); *cf. White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004) ("It is axiomatic that when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning.").

Section 1348 uses two distinct terms to refer to the presence of a banking association: "established" and "located." The first sentence grants the district courts jurisdiction over "any action by a banking association *established* in the district for which the court is held" to enjoin the Comptroller of Currency or his receiver under chapter 2 of title 12. 28 U.S.C. § 1348 (emphasis added). The second sentence says that, for general jurisdictional purposes, national banks shall be "deemed citizens of the States in which they are respectively *located*." *Id.* (emphasis added).

These distinct terms can be given distinct meanings, because a national bank can have two different kinds of presence. First, a bank can have the generic physical presence of operating an office in a state or district. Second, every national banking association is required to designate in its organizational certificate "[t]he place where its operations of discount and deposit are to be carried on." 12 U.S.C. § 22. This specific *charter location* is typically (though apparently it need not always be) the principal place of the bank's business. *See Firstar Bank*, 253 F.3d at 994 n. 6 ("[A] national bank denominating a state other than its principal place of business in its organization certificate apparently either never occurs or is exceedingly rare.").

To give independent meaning to the distinct terms in section 1348, it is most reasonable to understand the place where a national bank is "established" to refer to a bank's charter location, and to understand the place where it is "located" to refer to the place or places where it has a physical presence. This interpretation accords not only with the ordinary meaning of "located," which refers to physical presence in general terms, *see supra*, but also with the ordinary meaning of "established," which connotes specifically an *original* and *permanent* location. *See, e.g., Webster's Third* at 778 (defining "establish" as "to place, install, or set up *in a permanent or relatively enduring* position esp. as regards living quarters,

business, social life, or possession," or "to bring into existence, create, make, start, originate, found, or build usu[ally] *as permanent or with permanence in view*" (emphases added)). A national bank is originally and permanently *established* at its main office, which cannot be moved more than thirty miles outside the city of its original location, and even then only with approval of two-thirds of the shareholders and the Comptroller of Currency. *See* 12 U.S.C. § 30(b). A bank is thereafter and temporarily *located* at its branch offices, which it can open and move at will, subject to the approval of the Comptroller. *See* 12 U.S.C. § 36(i).

In *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), the Supreme Court attributed the same two definitions to "established" and "located" in the former venue statute for national banks. The prior version of 12 U.S.C. § 94 at issue in that case read as follows:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be *established*, or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases.

Bougas, 434 U.S. at 35-36 (emphasis added) (quoting Rev. Stat. § 5198, *as amended by* Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 316, 320). The Court noted that the lower courts had reached no consensus on the meaning of "located," but had unanimously concluded that "established" referred to a bank's charter location. *See Bougas*, 434 U.S. at 39 ("The lower federal courts appear to be unanimous in holding that a national bank . . . is 'established' only in the federal district that encompasses the place specified in the bank's charter."); *see also, e.g., Leonardi v. Chase Nat'l Bank*, 81 F.2d 19, 22 (2d Cir. 1936), *cert. denied*, 298 U.S. 677 (1936) ("[T]he district in which the national bank has its principal place of business and which contains the place recited in its charter

. . . should be taken as the proper district for suits against a national bank."). The Court determined that "located," used in close conjunction with "established" in the same statute, must be given a different meaning: "[T]he two words are different . . . . Whatever the reason behind the distinction in the words, it does exist, and we recognize it." *Bougas*, 434 U.S. at 44. The Court concluded that a national bank was "located" in any county where it operated a branch office. *Id.* at 38.

The principle that different terms conjunctively used in the same statute should be given different meanings is *identically* applicable here. Indeed, section 1348 includes the very same words "established" and "located," used in similarly close proximity and in a highly similar context, as did the former version of 12 U.S.C. § 94.[1] As in *Bougas*, the two words must be given their distinct meanings.

Acknowledging this principle of interpretation, the Seventh Circuit argued that the two words in section 1348, "established" and "located," could be given different meanings by construing the place where a bank is "established" to refer to a bank's charter location, and the place where it is "located" to refer to a bank's *principal* place of business — though the two are almost invariably identical. *See Firstar Bank*, 253 F.3d at 992, 994 n.6. Here, Wachovia makes the related observation that branch banking was not permitted for national banks until the McFadden Act of 1927. *See* Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1224, 1228; *see also* Act

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[1] Interestingly and not insignificantly, the two statutes — section 1348 (at issue here) and the former 12 U.S.C. § 94 (at issue in *Bougas*) — are even syntactically nearly identical. The Supreme Court rejected, as in fact materially insignificant to its interpretation of section 94, the only words in section 94 materially different from those chosen by Congress in section 1348. *See Bougas*, 434 U.S. at 45.

of June 16, 1933, ch. 89, § 23, 48 Stat. 162, 189-90 ("the 1933 statute") (permitting national bank branches in places other than the charter location); *Bougas*, 434 U.S. at 43 (noting that the McFadden Act only permitted national bank branches in the same city as the charter location, and that "[i]t was not until 1933 that Congress approved, upon specified conditions, national bank branches beyond the place named in the charter"). Thus, Wachovia argues, at the time of the 1887 Act's enactment, "located" could *only* refer to the principal office of a bank, which was always identical to the charter location. *See Appellant's Supp. Br.* at 3.

As to the Seventh Circuit's interpretation, which has been embraced by the Fifth Circuit, one might object that, as a matter of *practical* effect, it fails to give independent meanings to the terms "located" and "established" in section 1348, because the bank's charter location is almost invariably the same as its principal place of business. *See Firstar Bank*, 253 F.3d at 994 n.6. But we do not rest our disagreement with the Seventh Circuit's application of the statutory canon that different terms should be given different meanings on this ground; rather, we rest our disagreement with our sister circuit on the utterly implausible construction that its interpretation places upon the term "located." We simply do not believe that the place in which a bank is "located" can fairly be understood, without specialized definition (express or contextual), to refer to the place where it primarily conducts its business. And if a bank is said to be "located" *only* in the place in which it primarily conducts its business, and in no other place in which it is physically located — as the Seventh Circuit has held — then we are certain that words have little if any meaning beyond that which the particular speaker employing them says they do.

In sum, if Congress wishes to specify *principal* place of business and thereby exclude branch locations, it can easily do so. And in fact it has done so elsewhere. *See, e.g.*, 12

U.S.C. § 94 (restricting venue of suits against national banking associations to federal district courts and state courts in districts and counties "in which that association's *principal* place of business is located" (emphasis added)). But it did not do so in section 1348, and we should not interpret the provision as if it did.

Wachovia's closely related historical argument is likewise unavailing. Wachovia suggests that, because "located" in the 1887 Act could refer only to a bank's principal office prior to the advent of branch banking in 1927, "located" in section 1348 likewise must be read to refer only to a bank's principal office. *See Appellant's Supp. Br.* at 5. The Supreme Court was unpersuaded in *Bougas* by a similar argument regarding the venue statute, *see* 434 U.S. at 43, and we agree that this logic must be rejected here as well. Under traditional tools of interpretation, the statutory history that Wachovia describes actually supports the opposite conclusion: Congress' readoption of the *general* term "located" in 1948, after it became possible for national banks to locate to other states through branch offices, confirms that Congress did *not* intend to restrict the term to a bank's principal place of business. In 1927, it first became possible (in ordinary parlance) for a national bank to be "located" in a place *either* through its principal office *or* through its branch offices. Congress was aware of this change, having effected the change itself. Because, in reenacting section 1348, Congress did not specify "principal" or "branch" location, but instead retained the general term "located," history reveals, if anything, that Congress did *not* intend to restrict the meaning of "located" beyond its meaning in ordinary parlance and *did* intend to bring branch offices within the scope of the section.

Therefore, the words "established" and "located" should be given distinct meanings in section 1348. As the Supreme Court acknowledged in *Bougas*, "established" most naturally

refers to charter location, while "located" most naturally refers to the site of any office. *Bougas*, 434 U.S. at 44.

ii.

The Supreme Court's interpretation of "located" in *Bougas* controls the meaning of "located" in section 1348 for another reason as well. Because the jurisdiction and venue statutes pertain to the same subject matter, namely the amenability of national banking associations to suit in federal court, under the *in pari materia* canon the two statutes should be interpreted as using the same vocabulary consistently to discuss this same subject matter.

In *Bougas*, the Supreme Court held that the word "located" in the version of the federal venue statute then in effect referred to branch locations. *See Bougas*, 434 U.S. at 45. The version of the venue statute interpreted in *Bougas* was enacted in 1875, and was thus in effect when section 1348 was enacted in 1948. *See* Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320. As described above, section 1348 reflected the terminology of the venue statute by using *both* "established" and "located" to refer to the presence of national banks. *See supra*. Section 1348, the jurisdictional statute, thus adopted precisely the same vocabulary to describe banks' presence as did the then-existing venue statute.

Statutes that are *in pari materia* or relating to the same subject matter are to be interpreted in light of, and consistently with, one another. *United States v. Stewart*, 311 U.S. 60, 64 (1940) ("[A]ll acts *in pari materia* are to be taken together, as if they were one law."). This interpretive principle is especially applicable when the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (construing a provision of the ADEA that was "almost in *haec verba* with" a provision of Title VII to reflect judicial constructions of the Title VII provision); *United States v.*

Srnsky, 271 F.3d 595, 602 (4th Cir. 2001) (arguing that the "nearly identical language" in adjacent statutory subsections must be read *in pari materia*). Here, section 1348 adopted the same vocabulary — the terms "established" and "located" — to refer to the same subject matter, namely the location of national banking associations in relation to their capacity for suit, as did the former venue statute. Since the Supreme Court in *Bougas* provided the definitive construction of those terms in the venue statute, the *in pari materia* canon directs us to adopt the same construction for the jurisdiction statute.[2]

In refusing to apply the *in pari materia* canon, the Seventh Circuit maintained that section 1348 and the former 12 U.S.C. § 94 should not be treated as *in pari materia* because, though they addressed similar *subject matters*, they did not serve similar legislative purposes. *See Firstar Bank*, 253 F.3d at 990 ("A number of cases have refused to apply the canon to laws superficially relating to similar subjects where a finer examination revealed that the purposes underlying the laws varied."). But the cases relied on by the *Firstar Bank* court did not address *identical terms* applied in *similar statutes* to the *same very specific subject matter*; instead, they addressed the interpretation of wholly distinct terms applied

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[2] In 1982, Congress amended the venue statute interpreted in *Bougas* to change the result of *Bougas*. *See* 12 U.S.C. § 94 (providing for venue only "within the district in which [a national bank's] principal place of business is located"). But the subsequent amendment of the venue statute does not change the fact that, in 1948, Congress adopted a consistent vocabulary to describe the geographic presence of national banking associations for the purposes of suit in federal courts. In general, subsequent amendment or repeal of a statute does not render it irrelevant to *in pari materia* analysis. *See, e.g.*, *Benner v. Wichman*, 874 P.2d 949, 957 n.18 (Alaska 1994); *see generally 2B Norman J. Singer, Sutherland's Statutes and Statutory Construction* § 51.04 (6th ed. 2000) (citing cases).

to distinctly different subjects. *See United States v. Granderson*, 511 U.S. 39, 50-51 (1994) (refusing to interpret "original sentence" in light of the use of "supervised release" in another statute, and rejecting the argument that "the discrete, *differently worded* probation and supervised release revocation provisions should be construed *in pari materia*" (emphasis added)); *Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 647-48 (1990) (refusing to read "conditions of employment" in a labor statute to exclude wages just because other labor statutes dealing with *other subject matters* in "entirely different fields of employment" had listed wages separately from conditions of employment). In contrast, in the case of section 1348, Congress adopted a set of specific terms to refer to the same very specific subject matter, namely describing the physical presence of national banking associations to determine their capacity for and amenability to suit in federal courts. In such circumstances, application of the *in pari materia* canon reflects the judgment that Congress, like other rational speakers, uses words consistently when speaking about similar subjects, *regardless* of its generalized purposes. Therefore, the two statutes should be treated as *in pari materia* and the Supreme Court's interpretation of "located" in *Bougas* must control the meaning of the same term in section 1348.

In fashion similar to that of the Seventh Circuit, the dissent urges that the *in pari materia* canon should not apply because there are "significant meaningful distinctions" between the doctrine of venue and the provision for diversity jurisdiction. *Post* at 36. But in what amounts to a full concession of the applicability of the canon, the dissent admits that the *relevant* subject matters of the venue and diversity jurisdiction statutes are identical: as the dissent frankly acknowledges both "concern whether a national bank may initiate suit or be sued in federal court." *Id.* The further observation made by the dissent that venue serves litigants'

convenience while diversity jurisdiction is concerned with bias does not defeat the application of the canon. To permit it to do so would be to insist upon far too specific a congruity of purpose; no two statutes would ever be sufficiently similar to warrant application of the canon. And courts have never insisted on such absolute identity of purpose. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) (patent law and antitrust law are *in pari materia*); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, (6th Cir. 1966) ("The Federal Trade Commission Act may be construed *in pari materia* with the Sherman and Clayton Acts."); *Hallenbeck v. Penn. Mut. Life Ins. Co.*, 323 F.2d 566, 571 (4th Cir. 1963) ("It is well established that statutes which relate to the same persons or things, *or* the same class of persons or things, or have a common purpose may be regarded as 'in pari materia.'" (emphasis added)). Indeed, the very treatise that the dissent cites summarizes the criteria for applying the canon this way: "The guiding principle . . . is that if it is natural and reasonable to think that the understanding of members of the legislature or persons to be affected by a statute, be influenced by another statute, then a court called upon to construe the act in question should also allow its understanding to be similarly influenced." 2B *Sutherland's Statutory Construction* § 51.03, at 212. Here, of course, not only is it eminently "natural and reasonable" to think that Congress, in describing the presence of national banking associations to determine their capacity to sue and be sued in federal courts, would use the words "established" and "located" consistently in the two statutes; the opposite conclusion would be *un* natural and *un* reasonable.

Even if the two statutes are *not* treated as *in pari materia*, the meanings of "established" and "located" in the venue statute still provide highly persuasive evidence of the meanings of the same terms in the jurisdiction statute. *Identical* words, even occurring in *unrelated* statutes, should be interpreted to have identical meanings whenever reasonably possible. *See, e.g., Overstreet v. North Shore Corp.*, 318 U.S. 125, 129-30 (1943) (construing the phrase "engaged in commerce" in the Fair Labor Standards Act in light of existing constructions of the same phrase in the Federal Employers' Liability Act, without describing the two statutes as *in pari materia*); *Link v. City of Shelton*, 186 Conn. 623, 443 A.2d 902, 904 (1982) (construing the phrase "in the course of his duty" in the statute in question in light of the same phrase in the "unrelated" workers' compensation statute); *see generally* 2B *Sutherland's Statutory Construction* § 53:03, at 327-31.

Furthermore, even if we were to ignore *Bougas* and to adopt the dissent's suggestion that the diversity jurisdiction statute be interpreted in light of its "historical purpose," namely preventing bias against out-of-state parties, there is no reason to believe that this purpose would lead us to adopt the dissent's construction of section 1348. On the contrary, there is not a shred of evidence that Congress, in enacting section 1348, was concerned with shielding national banks from potential bias in the courts of the states where they operate branch offices. The only evidence that the dissent even offers is the fact that Congress, in 28 U.S.C. § 1332(c)(1), restricted the citizenship of corporations to the states of incorporation and of principal place of business. *See post* at 37 ("[T]he rationale underlying the concept of diversity jurisdiction led Congress to limit the states where a corporation may be deemed to possess citizenship [sic] . . . ."). But section 1332(c)(1) does not evidence that Congress had any universal concern with potential state-court bias against entities with a substantial business presence in a given state. Section 1332(c)(1) is more naturally viewed as evidence of Congress' desire to adopt a bright-line rule to govern the citizenship of corporations — or perhaps more appropriately, as evidence merely of corporations' lobbying clout. Moreover, as we discuss below, the divergent language of section 1348 suggests

that Congress did *not* intend to adopt the same rule in section 1348 as it adopted in section 1332(c)(1), *see infra*.

In short, even if we were to ignore the Supreme Court's construction of "located" and "established" in *Bougas*, the "rationale underlying the concept of diversity jurisdiction" would still provide no warrant to adopt the dissent's position. The notion that Congress believed that national banks that actively conduct business in a state cannot get a fair adjudication of state-law claims in that state's courts is rank speculation, as even the dissent would have to acknowledge. In fact, if one were to engage in surmise, it would be just as defensible to conclude that Congress believed it entirely reasonable in such circumstances to deny national banking associations resort to the federal courts, over the courts of the states in which the banks have chosen to locate branch offices; for it might have appeared unseemly to permit the national banks to seek and receive the trust and business of a state's citizens, but at the same time to permit them to refuse, out of distrust of those citizen-customers, to subject themselves to the courts created by those citizens to protect their rights against those who seek, receive, and breach their trust reposed. In all events, we certainly would not indulge the former inference as to congressional belief where there is absolutely no evidence of such belief and the language chosen by Congress all but confirms the contrary.

III.

Despite the ordinary meaning of section 1348 and its obvious analog in the venue statute interpreted in *Bougas*, Wachovia persists that "located" is nevertheless ambiguous. *See Appellant's Supp. Br.* at 1 ("[T]he word 'located' lacks any plain or unambiguous meaning when applied to the activities of national banks."); *see also Bougas*, 434 U.S. at 44 ("There is no enduring rigidity about the word 'located.'"). Wachovia argues that "located" in section 1348 must be interpreted to incorporate the settled background understanding of the

term. *See Appellant's Supp. Br.* at 3; *see also Firstar Bank*, 253 F.3d at 988.

As an initial matter, we do not believe that the term "located" in section 1348 is ambiguous between "physically present," and "principal place of business" or "principally physically present." We think the word simply means "physically present," especially in light of the Supreme Court's definitive construction of the former 12 U.S.C. § 94. But even if the meaning of the word were sufficiently indeterminate to justify consulting such extrinsic evidence, no proffered background understanding sheds any light on the meaning of "located" *as applied to branch offices*. No consistent statutory usage, no settled meaning in the case law, and no historical statutory purpose addressed the question whether "located" includes branch offices. This issue had never been "clarified by judicial construction" and had never reached any "established understanding" at the time of section 1348's enactment. *Firstar Bank*, 253 F.3d at 988.

A.

First, Congress did not rely on any settled background meaning other than the ordinary meaning of "located" when it enacted section 1348, because neither the federal banking statutes nor the cases interpreting them had established one. Wachovia concedes that Congress' use of "located" and its cognates to refer to national banking associations in federal statutes has been "far from uniform." *Appellant's Supp. Br.* at 1. In some sections of title 12, the context makes clear that "location" is being used in a specialized sense to refer only to charter location. *See, e.g.*, 12 U.S.C. § 52 (requiring the capital stock certificates of a national banking association to state "the name and location of the association"); 12 U.S.C. § 75 (providing for rescheduled annual shareholders' meetings when the meeting day "falls on a legal holiday in the State in which the bank is located"); 12 U.S.C. § 182 (requiring notice of intent to dissolve to be published "for a period

of two months in every issue of a newspaper published in the city or town in which the association is located"). In other sections, the context is clear that "located" is being used in its ordinary or natural sense, to include branch locations. *See, e.g.*, 12 U.S.C. § 36 (defining "branch" to include "any branch place of business located in any State"); 12 U.S.C. § 92 (authorizing any national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants" to operate as an insurance agent). So the statutory usage of "located" does not establish any specialized meaning for the term apart from its ordinary meaning.

Neither did Congress rely on any settled background meaning of "located" in the case law. Apparently only one court considered the issue of branch locations under the 1887 Act prior to enactment of section 1348. *See Am. Sur. Co. v. Bank of Cal.*, 133 F.2d 160, 161-62 (9th Cir. 1943) (holding that a national bank is "located" only at its principal place of business under the 1887 Act, on analogy to the parallel rule for corporations). That one case is not enough to establish a settled background meaning upon which Congress necessarily implicitly relied in employing the word "located." And, as the Supreme Court noted in *Bougas*, courts disagreed widely about the meaning of "located" in the venue statute when they came to address the issue of branch banks. *See Bougas*, 434 U.S. at 39-41 (describing "three diverse interpretations" in state courts of the word "located" in the former section 94).

A line of cases prior to 1948 did interpret "located" to refer to *charter* location in the former venue statute. *See, e.g., Mfr.'s Nat'l Bank v. Baack*, 16 F. Cas. 671, 673 (C.C.S.D.N.Y. 1871) ("It is quite apparent, from all these statutory provisions, that congress [sic] regards a national banking association as being 'located' at the place specified in its organization certification."); *Raiola v. Los Angeles*

First Nat'l Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 302 (N.Y. City Ct. 1929) (relying on *Baack* to conclude that "[t]he location of a national banking association is the place specified in its organization certificate"); *Leonardi v. Chase Nat'l Bank*, 81 F.2d 19, 21-22 (2d Cir. 1936) (crediting *Baack* 's conclusion that "located" refers to charter location and holding that a bank is only "established" at its charter location, not at its *branch offices*). However, none of these cases confronted the question whether a bank is located at its branch offices. On the contrary, the *Baack* case, which provided the authority for the subsequent cases, was decided long before the McFadden Act, and so necessarily presupposed that charter location was the *only* candidate for "location." Thus *Baack* did not create an "established understanding" that "located" excludes branch offices; branch offices did not even exist at the time it was decided. Similarly, neither *Leonardi* nor *Raiola*, in relying on *Baack's* characterization of the venue statute, confronted the issue of whether a bank is "located" in those places in which it has branch offices.

It follows that there was no settled background understanding of "located" as it applied to branch offices prior to 1948. This is unsurprising of course, because interstate branch offices did not exist prior to 1933. *See supra*. The issue was very seldom raised, much less settled, in the fifteen years between the 1933 statute and the enactment of section 1348.

B.

Undeterred, Wachovia argues that section 1348 must be interpreted in light of a broad historical purpose, which Wachovia characterizes as the intent "to give national banks the same access to diversity jurisdiction as that enjoyed by state corporations and individual citizens generally." *Appellant's Supp. Br.* at 3; *see also Firstar Bank*, 253 F.3d at 988 ("Congress passed 28 U.S.C. § 1348 against an interpretive back-

ground which assumed that national banks were to have the same access to the federal courts as state banks and corporations.").

Wachovia points out that, prior to 1882, Congress had provided general federal question jurisdiction of all suits involving national banks. *Appellant's Supp. Br.* at 2 (citing *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892)). But Congress sought to reduce this broad access to the federal courts in statutes enacted in 1882 and 1887. The 1882 Act pared back the national banks' access to federal courts by purporting to place them on the same footing as state banks: "[J]urisdiction for suits hereafter brought by or against any [national banking association] . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163 ("the 1882 Act"). Congress replaced this language in the 1887 Act by referring to jurisdictional parity with individual citizens, providing that national banks "shall, for the purposes of all actions by or against them . . . be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." 24 Stat. at 554-55 (1887).

Wachovia argues that these two Acts established a settled background understanding, re-adopted by Congress in section 1348, that national banks should have the same jurisdictional access to federal courts as state banks and citizens. *Appellant's Supp. Br.* at 2; *see also Firstar Bank*, 253 F.3d at 993 ("'[L]ocated' should be construed to maintain jurisdictional equality between national banks and state banks or other corporations."). For support, Wachovia relies on statements in two Supreme Court cases commenting on the 1882 Act. *See Petri*, 142 U.S. at 649 (noting that, under the

1882 Act, national banks "were placed in the same category with banks not organized under the laws of the United States"); *Leather Mfr.'s Nat'l Bank v. Cooper*, 120 U.S. 778, 780 (1887) (describing the purpose of the 1882 Act as "to put national banks on the same footing as the banks of the state where they were located for all the purposes of [federal] jurisdiction"); *see also Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 566 (1963) ("Section 4 [of the 1882 and 1887 Acts] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). On the basis of these generalizations, Wachovia would have us hold that "located" in section 1348 must be construed to exclude branch offices.

As an initial matter, we must observe that, though we are invited to interpret the word "located" in light of a supposed background principle of parity, we are confronted with several different formulations of that parity principle with no guidance on how to select among them. The 1882 Act required jurisdictional parity between national banks and *state banks*, and the *Cooper* Court commented that it was "intended to put national banks on the same footing as the banks of the state where they were located." *Cooper*, 120 U.S. at 780. In contrast, the 1887 Act required jurisdictional parity between national banks and *individual citizens*. Yet the *Petri* Court suggested that the 1887 Act established parity between national banks and "other corporations *and* individual citizens." *Petri*, 142 U.S. at 651 (emphasis added) (rejecting the argument that the 1887 Act stripped away *all* diversity jurisdiction of suits involving national banks). Here, Wachovia urges us to "give national banks the same access to diversity jurisdiction as that enjoyed by state corporations and individual citizens generally." *Appellant's Supp. Br.* at 3. And the Seventh Circuit called for "jurisdictional equality between national banks and state banks and other corporations."

Firstar Bank, 253 F.3d at 993. None of these formulations are equivalent. Moreover, even if we knew whether this elusive parity principle referred to individual citizens, state banks, state corporations, or all three, it would still be unclear whether that parity was fixed with reference to the jurisdictional access "enjoyed" by these entities *in 1948 when section 1348 was enacted*, or whether the word "located" in section 1348 must be interpreted to include an *evolving* reference to the jurisdictional access of state corporations *as Congress amends it over the years*, as the Seventh Circuit apparently believed. *See Firstar Bank*, 253 F.3d at 994 n.5 ("Interpreting 28 U.S.C. § 1348, the current version of which was promulgated in 1948, by referencing 28 U.S.C. § 1332(c)(1), *enacted ten years later in 1958*, might strike some as incongruous. However, the classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, *necessarily assumes that the implications of a statute may be altered by the implications of a later statute*." (emphases added) (internal quotation marks omitted) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988))).

But even if we thought the statute was ambiguous enough to warrant consulting such abstract, judicially intuited purposes, and even if the abstract purpose urged upon us were sufficiently definite to provide clear guidance, we would reject Wachovia's historical argument for at least three reasons.

First, the Supreme Court's characterizations in *Petri* and *Cooper* rested on the *actual text* of the 1882 Act. The 1882 Act was couched in terms of jurisdictional parity between national banks and state banks. *See supra*. *But that text was repealed and replaced in 1887*. The 1887 Act described national banks' citizenship in the terms "located" and "established," while including a clarifying clause about jurisdictional parity between national banks and individual citizens. *See supra*. *But, in 1948, this parity language was*

also repealed and replaced with section 1348. Section 1348, in contrast to both the 1882 and the 1887 Acts, however, includes no reference to state banks, to corporations, or to individual citizens whatsoever. Wachovia, thus, would have us conclude that Congress, by progressively *eliminating* parity language from the jurisdictional statute in two subsequent amendments, was thereby *ratifying* an abstract parity principle that was directly expressed *only in the 1882 Act, fifty years prior to enactment of the statute we interpret*. This strikes us as a patently unreasonable interpretation.

Second, even if the 1882 and 1887 Acts could be read to establish a parity principle, and even if we believed that Congress adopted this parity principle in section 1348, it seems clear that any principle formulated in the 1880s would be *inapplicable or, at best, neutral* as to the issue before us, because interstate branch offices did not exist until 1933. Plainly, the parity guaranteed in the 1887 Act, namely parity between national banks and *individual citizens*, was neutral on the issue of branch offices, because individual citizens do not have anything analogous to branch offices. And the Congress that required parity with state banks in 1882 (which parity was *repealed* in 1887) was not confronted with the possibility that national banks would be conducting business in multiple states. The Supreme Court in *Bougas* made a similar observation on the 1864 predecessor to the former venue statute:

> It suffices to stress that Congress did not contemplate today's national banking system, replete with branches, when it formulated the 1864 Act; that there are no sure indicators of 1864 congressional intent with respect to a banking system that did not then exist; and that prior to 1927, and indeed, prior to 1933, Congress had no occasion whatsoever to be concerned with state-court venue other than at the place designated in the bank's charter.

Bougas, 434 U.S. at 43. Even if Wachovia were correct in arguing that "Congress impliedly consented to the Supreme Court's 'settled meaning' of the statute [in 1948]," *Appellant's Supp. Br.* at 3, it still could not be correct in arguing that such a "settled meaning" (derived from Supreme Court cases decided in 1887 and 1892) had anything to say about the yet-unforeseen issue of branch banking.

In other words, even if the parity principle(s) ascribed by the Supreme Court to Congress in the 1882 Act and the 1887 Act were somehow incorporated into the 1948 statute, any such principle would only guarantee that *national banks are subject to the rules of diversity jurisdiction*, instead of automatically triggering federal question jurisdiction. *See, e.g.*, *Petri*, 142 U.S. at 648 (noting that the purpose of the 1882 Act was to eliminate federal "arising under" jurisdiction for suits involving national banks). The 1882 and 1887 Acts put national banks on "parity" with state banks and corporations only in this limited sense, namely that the access of all three to the federal courts would now be determined by their *citizenship* in various states — rather than by the presence of a federal charter. *See Horton*, 387 F.3d at 433 (rejecting the argument that "this approach achieves the parity Congress intended: a state bank organized in Texas, being a Texas citizen, would not be able to invoke diversity jurisdiction in a suit against a Texas citizen; hence, a national bank located or doing business in Texas . . . should also not be able to invoke diversity jurisdiction against a Texas citizen"). Despite the dissent's extensive reliance on *Petri* and *Cooper*, nothing in these cases can be construed to require that the same rules regarding the technical qualifications for state citizenship must apply both to national banks and to corporations. Indeed, nothing in those cases *could be* construed to require such highly specific, permanently synchronized parity (in the face of statutory language to the contrary), because as the Supreme Court recognized in *Bougas*, no one envisioned in

1887 that a national bank could ever be a citizen of more than one state.[3] *See Bougas*, 434 U.S. at 43.

In fact, Wachovia, the dissent, the Fifth Circuit, and the Seventh Circuit all rely on the following language from *Petri* as critical evidence for their sweeping "principle of jurisdictional parity": "No reason is perceived why it should be held that congress [sic] intended [in the 1887 Act] that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri*, 142 U.S. at 650-51. *See Appellant's Supp. Br.* at 2 (quoting this language); *post* at 435 (same); *Firstar Bank*, 253 F.3d at 986 (same); *Horton*, 387 F.3d at 433 & n.32 (same).[4] But, read in context, this language proves the very point we make here, because the *Petri* Court was addressing and rejecting the argument that the 1887 Act had *abolished diversity jurisdiction for national banks altogether*. *See Petri*, 142 U.S. at 649-50 ([I]t is contended that the federal courts cannot exercise the same jurisdiction in respect of national banks, by reason of diverse citizenship, as they possess in controversies

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[3] In rejecting a similar line of reasoning, the Fifth Circuit asserted in conclusory fashion that this argument "would lead to a narrow concept of 'parity.'" *Horton*, 387 F.3d at 433. Indeed it does. The reason to adopt such a "narrow concept of parity" is that it is the *only* concept of parity warranted by the historical materials. The Fifth Circuit adopted a broader concept of parity only by anachronistically imputing to the Congresses of 1882 and 1887 a definite intention on an issue that they could not possibly have envisioned.

[4] This language is critical because it is the only cited language from the contemporaneous Supreme Court that comments directly on the 1887 Act, which was the immediate predecessor to section 1348 and which included the word "located," rather than the 1882 Act, which did not include the word "located" and which was repealed in its entirety in 1887. The *Cooper* case exclusively addressed the 1882 Act, *see* 120 U.S. at 778-82.

between individual citizens of different states."). Therefore this language from the *Petri* Court, and the holding of the *Petri* case, established only the general conclusion that *federal courts could exercise diversity jurisdiction over national banks*, just as they do over corporations and individual citizens. This is the only "parity principle" in the *Petri* and *Cooper* cases, and it is unwarranted (not to mention anachronistic) to cite this language to support the considerably more specific conclusion that the identical *criteria of state citizenship* must apply to national banks and to corporations.

Precisely the same analysis applies to the language from the *Cooper* case quoted by Wachovia, the dissent, the Fifth Circuit, and the Seventh Circuit. The *Cooper* Court remarked that the 1882 Act "was evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Cooper*, 120 U.S. at 780; *see also Appellant's Supp. Br.* at 2 (quoting this language); *post* at 435 (same); *Firstar Bank*, 253 F.3d at 986 (same); *Horton*, 387 F.3d at 429 (same). But the issue that the *Cooper* Court addressed was whether *general federal question jurisdiction* for national banks had survived the enactment of the 1882 Act; its statement that the 1882 Act placed national banks "on the same footing" as state banks meant merely that the federal question jurisdiction previously enjoyed by national banks, but not by state banks, had indeed been abolished by the 1882 Act. *See Cooper*, 120 U.S. at 781 ("[S]o long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank *because of the source of its incorporation* [*i.e.* its federal charter]. A national bank was by that statute placed before the law *in this respect* the same as a bank not organized under the laws of the United States." (emphases added)).

Likewise, precisely the same analysis *also* applies to the *Langdeau* case of 1963, quoted by Wachovia, the Fifth Circuit, the Seventh Circuit. In *Langdeau*, the Supreme Court commented as follows:

> [T]he 1882 Act and the 1887 Act were designed to overcome the effect of [prior statutes] which allowed national banks to sue and be sued in the federal district and circuit courts *solely because they were national banks, without regard to diversity*, amount in controversy or the existence of a federal question in the usual sense.

Langdeau, 371 U.S. at 565-66 (emphasis added). But Wachovia, the Fifth Circuit, and the Seventh Circuit all quote *only* the very next sentence from *Langdeau*, which reads as follows:

> Section 4 [of the 1882 and 1887 Acts] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited.

Id. at 566; *see Appellant's Supp. Br.* at 3; *Firstar Bank*, 253 F.3d at 986; *Horton*, 387 F.3d at 430. By quoting this second sentence out of context, they misleadingly imply that *Langdeau* supports their interpretation, when in fact *Langdeau*, like *Petri* and *Cooper*, merely confirms that Congress' intent in the 1882 and 1887 Acts was to establish "parity" in the limited sense of abolishing automatic federal question jurisdiction for suits involving national banks.

Third, and perhaps most tellingly, if Congress desired to "maintain this parity" between national banks and corporations, *Firstar Bank*, 253 F.3d at 993, it is very surprising that Congress did not adopt similar language in section 1348 to the language it adopted soon afterward in section 1332(c)(1), enacted in 1958. Section 1332(c)(1) provides for dual citizenship of corporations, in the state of incorporation and at the principal place of business, without using the words "lo-

cated" or "established." *See* 28 U.S.C. § 1332(c)(1). Section 1348, by contrast, makes no such explicit provision for singular or dual citizenship. Interpreting the diversity jurisdiction statute governing national banks in light of the diversity jurisdiction statute governing corporations, as seems reasonable, we would conclude that Congress' use of *entirely different* language in the two reflects that it did *not* intend to adopt the same jurisdictional scheme for national banks as for corporations.

In sum, Wachovia's attempts to alter the ordinary meaning of "located" by invoking a "settled meaning" of the term decided prior to enactment are unconvincing. "Located" carried no settled background meaning in statutory usage or case law, and section 1348 did not adopt any preexisting "parity principle" that might illuminate its meaning here.

C.

Notwithstanding the evident weakness and transparent flaws in the Fifth and Seventh Circuit opinions, the dissent stands on these opinions, as well as the Ninth Circuit's 1943 opinion in *American Surety Co.*, which interpreted the language of the 1887 Act. *See post* at 435-40. If we believed that raw numbers were relevant, we would point out that the dissent fails to count the Second Circuit's recent observation, though not in holding, that favors our interpretation. *See World Trade Center Properties*, 345 F.3d at 161 ("Defendant Wells Fargo is a national bank . . . and by statute is deemed to be a citizen of every state in which it has offices." (citing 28 U.S.C. § 1348)). But questions of statutory interpretation are not decided by majority vote of the courts of appeals, and bare citations to decisions by other courts cannot substitute for analysis. *See McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004) (en banc) (Luttig, J., dissenting) ("Judicial interpretation is not an exercise in poll-taking."). That our sister circuits may disagree with us in any given case is significant only insofar as their reasoning is persuasive. Here, that reasoning is simply unconvincing.

Because statutory interpretation must rest on analysis rather than a tally of judicial dispositions, the dissent's assertion that "prior to 1992, the 'unquestioned' and 'longstanding interpretation' was that 'located' did not include the branches of a national bank," is without significance. *Post* at 436 (alteration omitted) (quoting *Horton*, 387 F.3d at 428-29). But it is worth noting that, thus phrased, this observation is hardly ingenuous. No court challenged the dissent's construction of the term until 1992 only because there was no such construction available: the *first* case to address whether "located" in section 1348 included branch offices was the District of Rhode Island's 1992 opinion in *Iacono*, and that opinion construed the statute precisely as we do today. *See Conn. Nat'l Bank v. Iacono*, 785 F. Supp. 30, 31 (D.R.I. 1992) ("Whether a national banking association can also be deemed a citizen of the state in which its branch offices are 'located' is an issue that has rarely been discussed."). And the *Iacono* decision established the prevailing rule in the district courts prior to the Seventh Circuit's decision in *Firstar Bank* in 2001. *See Firstar Bank*, 253 F.3d at 985. Thus, the dissent's implication that our holding today departs from some settled weight of authority dating back to the enactment of section 1348 simply does not withstand scrutiny.

IV.

The word "located" in 28 U.S.C. § 1348 must be interpreted in accordance with its ordinary meaning of "physical presence." The Supreme Court's interpretation of the same word in a highly similar context in the *Bougas* case confirms the correctness of this construction. And no contrary background meaning is available counseling against this interpretation. Therefore, we hold that a national banking association is "located" under section 1348 in any state where it operates branch offices.

Because it is unsupported by statutory and historical analysis, the rival interpretation of the dissent and the Fifth and Seventh Circuits amounts to little more than judicial assertion of a policy preference in favor of federal forums for national banking associations. This policy may be preferable; indeed, Congress may ultimately adopt this policy by amending the statutory language, as it did to 12 U.S.C. § 94 in the aftermath of the Supreme Court's decision in *Bougas*. But our task is to interpret the language that Congress has actually enacted, not to anticipate what language it may enact in the future and judicially amend it accordingly. If the statute as written does not effectuate Congress' preference as to forum for such disputes as this, Congress may amend the statute. But for the courts to legislate such an amendment would be both to usurp the role of the legislature and to abdicate the role assigned to the judiciary. That which the Supreme Court of the United States observed in a directly analogous context fourteen years ago is strikingly fitting to our conclusion today:

> [A]ccommodating our diversity jurisdiction to the changing realities of commercial organization . . . is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word 'citizen.' . . . We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.

Carden v. Arkoma Assocs., 494 U.S. 185, 197 (1990).

Because both Wachovia and Schmidt are citizens of South Carolina, the judgment of the district court is vacated. The case is remanded with instructions to the district court to dismiss for lack of federal jurisdiction.

VACATED AND REMANDED

KING, Circuit Judge, dissenting:

I write separately because I disagree with the panel majority's reading of § 1348 of Title 28. As explained below, I have concluded that proper application of the term "located" in § 1348 means that diversity jurisdiction exists in this dispute. As a result, I must respectfully dissent.

Section 1332(a)(1) of Title 28 provides the district courts with original jurisdiction over suits between citizens of different states involving more than $75,000. As the majority recognizes, Wachovia's citizenship, and thus the presence of federal court jurisdiction, turns on the meaning of "located" in § 1348 (providing that national banks are "citizens of the States in which they are respectively located"). In this case, the defendants are citizens of South Carolina; plaintiff Wachovia is, pursuant to § 1348, located in North Carolina; and federal court jurisdiction is thus present.

As explained herein, the majority's conclusion that the term "located" also includes Wachovia's branch offices in South Carolina is incorrect for at least two reasons. First, as it is used in § 1348, "located" is an ambiguous term, implicating congressional intent. Congress has never sought or intended to relegate disputes involving national banks to the state courts. It has, on the contrary, consistently intended to provide national banks with the same access to the federal courts as that accorded other banks and corporations. And the Supreme Court has recognized and enforced congressional intent on this point. Second, I disagree with the view that the Court's decision in *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977) — construing the term "located" as it was used in a separate statute, 12 U.S.C. § 94 — controls our resolution of this issue.

I.

In construing an enactment of Congress, a court is to utilize two steps of analysis. *See Newport News Shipbldg. &*

Dry Dock Co. v. Brown, 376 F.3d 245, 248 (4th Cir. 2004). First, a reviewing court must assess whether the statutory term being construed is plain or ambiguous. If the term is unambiguous, the court simply applies the term's plain meaning. If the term is ambiguous, however, the reviewing court must take a second step and seek to determine the construction intended by Congress. *See id.* In this dispute, the term "located," as found in § 1348, is ambiguous, and Congress intended for that term to refer to Wachovia's principal place of business in North Carolina. My dissenting view on this issue is supported by the history of § 1348 and its statutory predecessors, by Supreme Court precedent, and by decisions of the courts of appeals that have addressed the meaning of "located" in the context of federal court jurisdiction.[1]

A.

We are obliged first to assess whether the pertinent provision of § 1348 " 'has a plain and unambiguous meaning' " in this proceeding. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 250 (4th Cir. 2004) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If "a statute speaks with clarity to an issue," then its meaning is plain and there is no need for further judicial inquiry. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *see also S.C. Dep't of Health & Envtl. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 255 (4th Cir. 2004). By contrast, a statutory term must be deemed ambiguous, if, when examined in context, it is susceptible to more than one reasonable interpretation. *Wilson*, 367 F.3d at 248. If such an ambiguity is apparent, we must

[1] *See Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); *Am. Surety Co. v. Bank of Cal.*, 133 F.2d 160 (9th Cir. 1943).

then ascertain the " 'interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'" *Comm'r v. Engle*, 464 U.S. 206, 217 (1984) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

Put most simply, I part company with the panel majority on its view that "located" is an unambiguous statutory term. Under the accepted definitions of "locate," the term refers to a particular or specific position, rather than to a general physical presence. *See, e.g.*, *Black's Law Dictionary* 958 (8th ed. 2004) (defining "location" as "[t]he specific place or position of a person or thing"); *Webster's Third New International Dictionary* 1327 (reprint 1993) (1981) (defining "locate" as "to set or establish in a particular spot or position").[2] In this proceeding, "located" could refer either to Wachovia's principal place of business (North Carolina), to the place named in its certificate of organization (North Carolina), or to any state in which Wachovia has established branch offices (such as South Carolina). As the majority observes, the *Bougas* Court recognized such an ambiguity in how the term "located" was used in § 94 of Title 12, a separate statute addressing state court venue for proceedings involving national

[2] Previous versions of these sources, and other sources as well, affirm the proposition that "locate" refers to a particular or specific position. See *Black's Law Dictionary* 1089 (4th ed. 1968) (defining "location" as "[s]ite or place"); 8 *The Oxford English Dictionary* 1081 (reprint 2004) (2d ed. 1989) (defining "locate" as "[t]o fix or establish in a place"). Only one definition emphasizes "located" as being related to physical presence. *See Black's Law Dictionary* 940 (6th ed. 1990) (defining "located" as "[h]aving physical presence or existence in a place").

banks.[3] Significantly, the Court there observed that "[t]here is no enduring rigidity about the word 'located,'" *Bougas*, 434 U.S. at 44, and it pronounced the term to be ambiguous. As a result, the Court proceeded to the second step of statutory construction and assessed the concerns Congress had sought to address in its adoption of § 94. *Bougas*, 434 U.S. at 44. We must do likewise.

B.

The relevant history of our national banks reveals that Congress intended for such banks to enjoy the same access to federal courts as that accorded other banks and corporations. When Congress first authorized the creation of national banks in 1863, it provided that suits by and against them could be initiated in the federal courts. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 681. In 1882, Congress amended its 1863 enactment to eliminate automatic federal question jurisdiction over all disputes involving national banks. *See Leather Mfrs.' Bank v. Cooper*, 120 U.S. 778, 780-81 (1887). Nonetheless, the amendment provided plainly that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." Act of July 12, 1882, ch. 290, 22 Stat. 162, 163. The Court promptly construed this amendment to place "national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Bank*,

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[3] The Court's *Bougas* decision only addressed the meaning of 12 U.S.C. § 94, which then provided that actions against national banks may be brought in any district court "within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said [national bank] is located having jurisdiction in similar cases." *Bougas*, 434 U.S. at 35-36 (quoting 12 U.S.C. § 94).

120 U.S. at 780; *see also Petri v. Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 649 (1892) (observing that 1882 amendment "placed [national banks] in the same category with banks not organized under the laws of the United States").

In 1887, Congress revised the jurisdictional statute to include the language that we must assess today. *See* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554 (providing that "all national banking associations . . . shall . . . be deemed citizens of the States in which they are respectively located"). The 1887 enactment also provided that, "in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." *Id.* at 554-55. In assessing this statutory revision, the Court again recognized and applied the clear intent of Congress that national banks be accorded equal access to the federal courts. *See Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might."); *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 600 (E.D. Pa. 1999) (recognizing that the 1887 act changed the structure of the 1882, but it "did not change the purpose"). In 1948, when the national bank jurisdictional statute was codified as the present § 1348, Congress left fully intact its provision that national banks are "citizens of the States in which they are respectively located." *See* 28 U.S.C. § 1348.

As this historical review reflects, the Court has viewed § 1348 as according national banks the same access to the federal courts as that enjoyed by state banks and corporations. Significantly, Congress has never altered the pertinent statutory language, although it has repeatedly revised other

aspects of the jurisdictional statute.[4] In my view, Congress has thereby, in each of these enactments, manifested its intent to sanction applicable judicial and administrative interpretations of the statute. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate its administrative and judicial interpretations as well.").

C.

Three of our sister courts of appeals have faced the very issue posed to us today, and I agree with their decisions construing the term "located" in § 1348 to provide national banks the same access to the federal courts as that accorded other banks and corporations.[5] Most recently, the Fifth Cir-

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[4] For example, in adopting the Judicial Code of 1911, Congress altered the structure of the jurisdictional provision of the 1887 act, while retaining *in haec verba* its language regarding citizenship. *Horton*, 387 F.3d at 431. This structural revision was obviously designed "to make the purpose of the reenacted statute clearer . . . ." *Herrmann v. Edwards*, 238 U.S. 107, 117 (1915).

[5] The Second Circuit has recently indicated that, pursuant to § 1348, a national bank should be deemed "a citizen of every state in which it has offices." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003). Needless to say, I am unpersuaded by this dicta. As I read it, the decision upon which that panel relied — *United Republic Ins. Co. in Receivership v. Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (per curiam) — did not *hold* that "located" includes a national bank's branch offices; it simply remanded for an assessment of citizenship. Indeed, the only court in the Second Circuit to directly address the issue viewed the language of *World Trade Center Properties* as "dicta" and as not controlling. *See RDC Funding Corp. v. Wachovia Bank, N.A.*, No. 3:03CV1360, 2004 WL

cuit, in its decision in *Horton v. Bank One, N.A.*, agreed with this very proposition. 387 F.3d at 436 (5th Cir. 2004) (holding that the definition of "located," as used in § 1348, is limited to a "national bank's principal place of business and the state listed in its organization certificate and its articles of association"). In so ruling, the court recognized that "[b]ecause section 1348 does not have any language modifying or rejecting the interpretive understanding that came with its predecessors, this court should presume that Congress intended to retain and incorporate the existing interpretive backdrop." *Id.* at 431. Similarly, the Seventh Circuit, in its *Firstar Bank, N.A. v. Faul* decision of 2001, adhered to the same principle, relying on the established presumption that "Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version." 253 F.3d 982, 988 (7th Cir. 2001); *see also Am. Surety Co. v. Bank of Cal.*, 133 F.2d 160, 162 (9th Cir. 1943) (explaining that, if Congress had intended to provide that national bank should be deemed citizen of states where branch offices are operated, "it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent").[6] In fact, as the *Horton* court recognized, "[p]rior to 1992, the 'unquestioned' and 'longstanding interpretation' was that 'located' did *not* include the branches of a national bank." 387 F.3d at 428-29 (emphasis in original) (quoting *Baker v. First Am. Nat'l Bank*, 111 F. Supp. 2d 799, 800 (W.D. La.

717111, at *2 n.6 (D. Conn. March 31, 2004). That court agreed with my take on this question. *See id.* at *6.

[6] In *American Surety Co.*, the court was called upon to construe the term "located" as found in 28 U.S.C. § 41, the predecessor of § 1348.

2000)).[7] The Comptroller of the Currency has also endorsed this view. *See* O.C.C. Interpretive Letter No. 952, 2003 WL 23221430, at *4 (O.C.C. June 2003) ("National banks are to be treated for diversity jurisdiction purposes in a manner similar to state banks."). As the *Faul* court has aptly explained, for sixty years leading up to the 1948 codification of § 1348, the term "located" was construed to mean that national banks would enjoy parity with state banks and corporations, and we must presume that Congress intended for that construction to continue. *See* 253 F.3d at 988.[8] And as the court appropriately observed, nothing "in the statute rebuts this presumption." *Id.* at 988-89 (contrasting 1882 enact-

[7] The district courts to have confronted this issue since the Seventh Circuit's decision in *Faul* have all agreed with that court's holding, including a court in this circuit. *Compare MBIA Ins. Corp. v. Royal Indem. Co.*, 294 F. Supp. 2d 606 (D. Del. 2003), *Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629 (D. Md. 2002), *Bank One, N.A. v. Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808 (N.D. Tex. 2002), *Baker v. First Am. Nat'l Bank*, 111 F. Supp. 2d 799 (W.D. La. 2000), *and Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594 (E.D. Pa. 1999) (holding that national bank is citizen of state of its principal place of business and not citizen of any other state where it has branch), *with Ferraiolo Constr., Inc. v. Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997), *Norwest Bank Minn., N.A. v. Patton*, 924 F. Supp. 114 (D. Colo. 1996), *Bank of N.Y. v. Bank of Am.*, 861 F. Supp. 225 (S.D.N.Y. 1994), *and Conn. Nat'l Bank v. Iacono*, 785 F. Supp. 30 (D.R.I. 1992) (agreeing that national bank has citizenship in every state where it has branch).

[8] Because a corporation is a citizen of both the state in which it is incorporated and the state in which it maintains its principal place of business, a national bank, to be treated similarly, should be a citizen of the state of its principal place of business and the state named in its organizational certificate. *Horton*, 387 F.3d at 436; *Faul*, 253 F.3d at 994.

ment, which explicitly declared that national banks no longer enjoyed federal jurisdiction based on their federal status).[9] Adhering to this reasoning, Judge Higginbotham, in writing for the *Horton* court, similarly concluded that "we should read section 1348 as retaining its objective of jurisdictional parity for national banks vis-a-vis state banks and corporations." 387 F.3d at 431.

II.

Notwithstanding the foregoing, the panel majority has concluded that the Court's decision in *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977), is controlling here. With respect, three compelling reasons serve to undercut the majority's reliance on *Bougas*. First, the *Bougas* Court confined its ruling to the state court venue provision of 12 U.S.C. § 94, declaring that it was not deciding an issue of venue — much less jurisdiction — in the federal courts. Second, the *in pari materia* canon of statutory construction does not dictate how we should construe "located" because § 94 does not address the same subject as § 1348. Third, the canon of construction that different words within the same statute should, if possible, be assigned different meanings, does not preclude "located" from meaning Wachovia's principal place of business.

[9] The only district court in this circuit to have faced the question of how the term "located" in § 1348 should be construed followed the *Faul* court's "reasoning and analysis." *See Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629, 631 (D. Md. 2002). In so doing, Judge Nickerson recognized that " 'located' should be construed to maintain jurisdictional equality between national banks and state banks or other corporations." *Id.* (quoting *Faul*, 253 F.3d at 993-94) (internal quotation marks omitted)).

A.

First of all, in rendering its decision in *Bougas*, the Court was assessing the congressional use of the term "located" in another statute, and its reasoning does not bind us. The *Bougas* appeal involved an issue of state court venue only, and the Court, in explaining its holding, carefully recognized that venue doctrines are primarily concerned with the convenience of the parties. In so doing, the Court concluded that, in the modern age, authorizing venue as present in a place where a national bank operates a branch office would not be unduly burdensome. *Bougas*, 434 U.S. at 44 & n. 10. Although the Court recognized that § 1348 also contains the term "located," *id.* at 36 n. 1, this singular reference was, as the *Horton* court aptly observed, merely pointed out by the *Bougas* Court "in a footnote, with no further comment . . . ." *Horton*, 387 F.3d at 433. Moreover, the *Bougas* Court's holding was confined to § 94 only, and the Court explicitly declared that it was not addressing any issue of venue in the federal courts. 434 U.S. at 39 (referencing 12 U.S.C. § 94). In these circumstances, the Court did not implicitly reverse its long-standing precedent concerning federal court jurisdiction involving national banks.

B.

Second, the *in pari materia* canon of statutory construction does not compel us to construe "located," as found in § 1348, in the same manner as the Court construed § 94 in *Bougas*. Of course, statutes *in pari materia* — or pertaining to the same subject matter — should be construed "as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (internal citation and quotation marks omitted). This canon is only applicable, however, when the statutes address the same subject. *See Faul*, 253 F.3d at 990; 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.03, at 138 (6th ed. 2004) (stating that "where the same subject is treated in several acts having different objects the

statutes are not in pari materia"). While the doctrines of both venue and jurisdiction concern whether a national bank may initiate suit or be sued in federal court, there are significant meaningful distinctions between them. *See Neirbo Co. v. Bethlehem Shipbldg. Corp.*, 308 U.S. 165, 168 (1939) ("This basic difference between the court's power and the litigant's convenience is historic in the federal courts.").[10] Put simply, venue provisions address the convenience of the parties, and they are designed to minimize the cost of obtaining a court's judgment. *Id.* at 990-91. Hence, the *Bougas* decision was premised on its conclusion that, with respect to state court proceedings, authorizing venue to lie in any county where a national bank operates a branch office, as opposed to the county of bank's incorporation, would not unduly inconvenience the party litigants. *See Bougas*, 434 U.S. at 44 (observing that "[w]hat Congress was concerned with [in § 94] was the untoward interruption of a national bank's business that might result from compelled production of bank records for *distant* litigation") (emphasis added); *see also Faul*, 253 F.3d at 989-90.

Diversity jurisdiction, on the other hand, does not implicate any issue of convenience to the parties. Its principal purpose is to minimize potential bias against out-of-state parties. *Guar. Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias."); *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968) (recognizing that "one of the principal purposes of diversity jurisdiction was to give a citizen of one state access to an unbiased court to protect him from parochialism if he was

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[10] As the *Horton* and *Faul* courts have emphasized, § 94 was enacted in 1864 as part of the National Banking Act, while § 1348 was adopted in 1948 as part of the Judiciary and Judicial Procedure Act. *See Horton*, 387 F.3d at 433; *Faul*, 253 F.3d at 990.

forced into litigation in another state in which he was a stranger and of which his opponent was a citizen"). As Chief Judge Flaum explained in *Faul*, "while venue provisions minimize the cost of obtaining a court's judgment without regard to what that judgment might be, diversity jurisdiction seeks to ensure a correct decision, in the sense of being rendered on the merits of the parties' case rather than because of prejudice against a foreigner." 253 F.3d at 991. The *Faul* court thus properly concluded that "the affirmative reasons offered for the [*Bougas*] court's holding have no applicability to questions of jurisdiction [,]" because "reductions in the cost of litigating do not justify separating national banks from all other corporations so as to deny them federal diversity jurisdiction . . . ." *Id.* at 989-90.

Indeed, the rationale underlying the concept of diversity jurisdiction led Congress to limit the states where a corporation may be deemed to possess citizenship, providing that a corporation is "a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1). And, as the Court has long recognized, national banks and corporations should be treated on the same basis for jurisdictional purposes. *See Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 566 (1963); *Petri*, 142 U.S. at 650-51; *Leather Mfrs.' Bank*, 120 U.S. at 780.

C.

Finally, though different terms used in the same statute should be assigned different meanings whenever possible, this principle of construction does not dictate our resolution of this jurisdictional dispute. Section 1348 utilizes two terms — "established" and "located" — to refer to the presence of a bank. As a result, the majority reads the term "established" to refer to a bank's charter location, and it reads "located" to refer to a bank's physical presence in general, concluding that "if Congress wishes to specify *principal* place of business and thereby exclude branch locations, it can easily do so." *Ante* at 421 (emphasis in original). In the 1880s, when these terms first appeared in the national bank jurisdictional statute, such banks were not authorized to engage in branch banking. Consequently, as the *Horton* court recognized, the terms " 'established' and 'located' would have been functionally equivalent for jurisdictional purposes" because a national bank was both "established" and "located" in the place specified in its certificate of organization. 387 F.3d at 434. After branch banking was legalized in 1927 and expanded in 1933, Congress amended the jurisdictional statute several times, leaving the location language intact. Although different ways of being "located" were possible when Congress codified the statute in 1948, I see no basis for concluding that Congress intended for § 1348 to reflect some new reality,[11] nor has any other court supported such an approach.[12]

In my view, it is more compelling to conclude that Congress, in 1948, intended to ratify the Supreme Court's earlier rulings, and thus to construe "located" to include only a national bank's principal place of business. *See Bragdon*, 524 U.S. at 645. Indeed, as the *Faul* court observed, "the canon that different words in the same statute should be given different meanings can be complied with by considering 'established' as referring only to the place specified in the bank's

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[11] For support for its position, the majority asserts that in 1948 Congress was aware that branch banking was possible, "having effected the change itself." *Ante* at 421. However, there is no indication that Congress intended the advent of branch banking to change the definition of "located" and to deviate from its settled precedent of according national banks access to the federal court.

[12] The district courts that have construed the term "located" in § 1348 to include branch offices, *see supra* note 6, relied principally on the *Bougas* construction of 12 U.S.C. § 94.

charter, while giving 'located' a meaning that includes a bank's principal place of business." 253 F.3d at 992.

III.

Pursuant to the foregoing, diversity jurisdiction is present here, and our creation of a circuit split on this issue is unwarranted. Because the majority has unjustifiably circumscribed federal court jurisdiction of disputes involving national banks, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

WACHOVIA BANK, NATIONAL ASSOCIATION,
Plaintiff,

vs.

DANIEL G. SCHMIDT; PRIAG, L.L.C.; and
DGS INVESTMENTS, INC.,
Defendants.

CA No. 6:03-2005-20

Filed: August 1, 2003
Entered: August 4, 2003

ORDER

This matter is before the court on Wachovia Bank, National Association's ("Wachovia") petition for an order of arbitration and motion to compel arbitration. After review, the court denies Wachovia's petition and motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Wachovia's petition and motion derive from a lawsuit presently pending in South Carolina state court involving Daniel G. Schmidt ("Schmidt"), Priag, L.L.C. ("Priag"), and DGC Investments, Inc. ("DGC") (collectively "the defendants")[1] versus Wachovia, KPMG L.L.C. ("KPMG"), and others. The state case involves the defendants' allegations that they were fraudulently induced by Wachovia f/k/a First Union National Bank, KPMG, and others to invest in a tax strategy devised by KPMG and marketed and sold by Wa-

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[1] Priag is a South Carolina company. (Pl.'s Pet. Arbitration Ex. A.) Schmidt owns ninety-eight (98) percent of Priag, while DGC owns the remaining two percent. (*Id.*)

chovia. (P1.'s Pet. Arbitration Ex A.) Specifically, the defendants allege that Wachovia, KPMG, and others falsely represented that the tax strategy was a "clean deal," "never audited," and strictly complied with the United States Internal Revenue Service's ("IRS") rules and regulations. (*Id.*) In addition, the defendants allege that at some point, they received a tax opinion letter which falsely stated that the tax strategy was legal. (*Id.*)

Upon agreeing to participate in the investment tax strategy, the defendants formalized their relationship with Wachovia by signing an engagement letter and paying a one hundred thousand dollar ($100,000.00) fee for Wachovia's financial services. (*Id.*) In addition, in order to fund their investment in the tax strategy, the defendants entered into a separate arrangement with Wachovia in which they borrowed three million five hundred thousand dollars ($3,500,000.00). (Pl.'s Mem. Supp. Mot. Compel Arbitration Ex. A.) In exchange for the loan, the defendants signed a promissory note which contained an arbitration provision. (*Id.*) The loan was used to pay fees that arose from the defendants' participation in the tax strategy, as well as to purchase a warrant for the purchase of stock from Sandpiper Capital, Inc. ("Sandpiper"). (*Id.* Ex. B, C.) The warrant also contained an arbitration provision. (Def.'s Mem. Opp'n Pet. Arbitration Ex. 3.)

In 2001, the defendants' investment began to collapse as the IRS began investigating KPMG's tax strategy. (Pl.'s Pet. Arbitration Ex. A.) Eventually, in 2002 the IRS instituted an audit of the defendants' tax returns for the years 1998 to 2001. (*Id.*) As a result of the IRS audit, the defendants paid substantial fees and will be required to repay taxes in excess of three million dollars ($3,000,000.00) plus interest and penalties. (*Id.*) Subsequently, as stated earlier, the defendants brought suit in the Greenville County Court of Common Pleas against Wachovia, KPMG, and others alleging a violation of the South Carolina Unfair Trade Practices Act

("SCUTPA"), S.C. Code Ann. § 39-5-10, et seq., as well as state common law claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, negligence, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, breach of fiduciary duties, and aiding and abetting a breach of fiduciary duty. In the state lawsuit, the defendants seek monetary as well as injunctive relief. Subsequently, based on the arbitration provisions in the promissory note and the warrant, Wachovia filed the instant petition for an order of arbitration and motion to compel arbitration. The defendants responded and ask the court to deny Wachovia's petition and motion.

II. Discussion of the Law

The parties agree that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., applies to the promissory note and warrant in this case and the promissory note and warrant contain valid, binding arbitration provisions. Wachovia asserts that pursuant to section one of the FAA it is entitled to an order compelling arbitration. "The [FAA] applies to contracts `evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." *Long v. Silver*, 248 F.3d 309, 315 (4th Cir. 2001) (quoting 9 U.S.C. § 2). In addition, the Supreme Court has announced a strong federal policy favoring arbitration. *See id.* at 316 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

"To that end, the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Id.* However, it is important to note that arbitration is voluntary, therefore "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In consideration of the above, the United States Court of Appeals for the

Fourth Circuit held that "the governing standard for determining the arbitrability of [claims] is whether [the claims] have a significant relationship" to the agreement containing the arbitration clause. *Long*, 248 F.3d at 316-17.

A. Promissory Note

Wachovia argues that the arbitration clause in the defendants' promissory note covers the state court conflict between Wachovia and the defendants. Specifically, Wachovia asserts that the promissory note is significantly related to the defendants' state court claims because the money Wachovia lent the defendants in exchange for the promissory note was used to fund the defendants' participation in the investment tax strategy. In opposition, the defendants argue that their action against Wachovia is based on the engagement letter, which does not contain an arbitration clause and makes no mention of a loan.

In support of its position, Wachovia argues that the court should follow the decisions in *Long, Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (4th Cir. 1998), and *J.J. Ryan, & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), because they are factually similar to the instant petition. In *Long* the court was faced with determining whether a 1972 and a 1999 agreement were significantly related to the plaintiff' claims so as to be covered by the arbitration clauses contained in those two agreements. *See Long*, 248 F.3d at 313. The 1972 agreement was a shareholder and employment agreement. *See id.* The 1999 agreement was a shareholder agreement. *See id.* The plaintiff asserted that he was promised that if he signed the 1999 agreement he would be employed by the company until he was seventy (70) years old. *See id.* Despite this promise, the plaintiff was fired six months after he signed the 1999 agreement. *See id.* at 313-14. As a result, the plaintiff filed suit asserting claims against the shareholders or "frustrat[ing] his reasonable expectations as a shareholder and an employee," breach of fiduciary duty,

breach of contract, failure to distribute profits proportionately, fraud, civil conspiracy, unfair and deceptive trade practices, and punitive damages, as well as a shareholder derivative action. *See id.* at 317-19. After consideration, the court concluded that the claims either arose from the contracts themselves, were based on the plaintiffs status as a shareholder, or were based on actions surrounding the agreements. *Long*, 248 F.3d at 317-19. Based on those conclusions, the court found that arbitration was warranted. *See id.* at 319.

In *Cara's Notions* the plaintiff owned two Hallmark stores. *See* 140 F.3d at 568. Upon acquiring the first store, Hallmark and the plaintiff entered into a "Trademark Licensing Agreement." *See id.* Upon acquiring the second store, Hallmark and plaintiff entered into a "Hallmark Account Agreement." *See id.* Thereafter, the plaintiffs were informed by their landlord that they would have to vacate the store one property at the end of the lease. *See id.* The plaintiffs found a new location, but Hallmark disapproved of the location. *See id.* However, unbeknownst to the plaintiffs, Hallmark leased the property at the new location for itself. *See id.* As a result, the plaintiffs fled suit alleging breach of fiduciary duty, deceptive trade practices, usurping a business opportunity, and misrepresentation. *See Cara's Notions*, 140 F.3d at 568. Hallmark then moved to compel arbitration based on the arbitration clause contained in the "Hallmark Account Agreement." *See id.* The plaintiff argued that the arbitration clause in that agreement was inapplicable because the agreement only applied to the second store. *See id.* at 569. Concluding that the agreement could be read to apply to both stores and that the plaintiffs were sophisticated business people who should have understood the scope of the agreement, the court ordered arbitration. *See id.* at 571.

In *J.J. Ryan* the plaintiff was an importer and distributor of the defendant's affiliates' products. *See* 863 F.2d at 316.

The plaintiff entered into a distribution agreement with each affiliate. *See id.* Each distribution agreement contained an arbitration clause. *See id.* at 316-17. Sometime later, wanting to have its affiliates distribute their own products, the defendant offered to purchase the plaintiff. *See id.* at 317. The parties could not agree on a price, and the negotiations broke down. *See id.* The plaintiff alleged that thereafter the defendant threatened to cancel the distribution agreements if the plaintiff did not accept its price. *See id.* As a result, the plaintiff brought suit alleging unfair and deceptive trade practices, interference with contractual relations, conversion in violation of the Uniform Commercial Code, abuse of process, and defamation. *See J.J. Ryan*, 863 F.2d at 319-20. Subsequently, the defendant filed a motion to compel arbitration. *See id.* at 320. In opposition to the motion to compel arbitration, the plaintiff argued that its claims arose out of agreements separate from the distribution agreement, and therefore were not arbitrable. *See id.* at 319. The separate agreements did not contain arbitration clauses. *See Id.* After consideration, the court found that the separate agreements implemented the primary distribution agreements, and therefore any claim arising from the separate agreements arose from the distribution agreements. *See id.* Therefore, pursuant to the arbitration clauses contained in the distribution agreements, the court ordered arbitration. *See id.* at 320.

After consideration, the court disagrees with Wachovia's assertion that the instant action is factually similar to the above-discussed cases. In those cases, the courts concluded that the plaintiffs' claims arose out of the relationship created by the agreement containing the arbitration clause. In this case, the actions giving rise to the instant lawsuit arose from the relationship between the defendants and Wachovia as it is defined by the engagement letter. While the court recognizes that the loan is part of the facts surrounding the state court claims, the promissory note is simply ancillary to the actions

giving rise to the defendants' claims. In fact, the defendants satisfied the promissory note within the period of time provided in the promissory note, (Def.'s Mem. Opp'n Arbitration at 4; P1.'s Mem. Reply Def s Mem. Opp'n Arbitration at 3), and the defendants make no claim against Wachovia for the loan proceeds. (Pl.'s Pet Arbitration Ex. A.)

Additionally, a thorough review of the facts underlying the defendants' state law claims against Wachovia reveals that the claims are not significantly related to the promissory note. Count One of the defendants' state law complaint alleges that Wachovia was part of a civil conspiracy to lure investors into a tax strategy which the defendants to that lawsuit knew was contrary to law for the purpose of obtaining and retaining the investor's fees. (Pl.'s Pet. Arbitration Ex. A.) The defendants further allege that Wachovia's involvement consisted of the marketing of the tax strategy and its financial services. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Five, Six, and Seven of the defendants' state court complaint allege, respectively, fraud, constructive fraud, and negligent misrepresentation on the part of Wachovia. (*Id.*) Specifically, the defendants allege that Wachovia intentionally or negligently falsely represented that the tax strategy was a "no lose" proposition, a "clean deal," and that it complied with IRS rules and regulations. (*Id.*) The defendants further allege that they justifiably relied on Wachovia's false representations in deciding to engage Wachovia's financial services. (*Id.*) The underlying facts of these claims bear no significant relationship to the promissory note.

Count Eight of the defendants' state court complaint alleges promissory estoppel. (*Id.*) Specifically, the defendants allege that they relied on Wachovia's representations to their detriment and have suffered damages. (Pl.'s Pet. Arbitration Ex. A.) Furthermore, the defendants allege that their damages consist of the fee they paid Wachovia pursuant to the en-

gagement letter. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Nine of the defendants' state court complaint alleges a violation of the SCUTPA. (*Id.*) Specifically, the defendants allege that Wachovia's marketing and servicing of the tax strategy is an unfair and deceptive trade practice capable of repetition. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Ten of the defendants' state court complaint alleges a breach of fiduciary duty. (*Id.*) Specifically, the defendants allege that by engaging Wachovia's financial services, Wachovia was placed in a fiduciary relationship with them. (*Id.*) Further, the defendants allege that by failing to give a full and fair disclosure Wachovia breached its duties. (Pl.'s Pet. Arbitration Ex. A.) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Eleven of the defendants' state court complaint alleges that Wachovia aided and abetted a breach of fiduciary duty. (*Id.*) Specifically, the defendants allege that Wachovia's conduct, actions, and statements contributed to a breach of fiduciary duty. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Finally, the defendants seek a declaratory judgment. (*Id.*) Specifically, the defendants seek to have the exculpatory language contained in Wachovia's engagement letter declared unenforceable.[2] (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note. Therefore, Wachovia's petition for an order of arbitration and motion to compel arbitration are denied as to the arbitration clause contained in the promissory note.

[2] Wachovia's engagement letter states that any damages arising out of Wachovia's relationship with the defendants under the engagement letter will be limited to Wachovia's one hundred thousand dollar ($100,000.00) fee. (Def.'s Mem. Opp'n Arbitration Ex. 1.)

B. Warrant

In addition, Wachovia seeks to compel arbitration pursuant to the arbitration clause contained in the warrant purchased by the defendants from Sandpiper. Wachovia is not a party to the warrant. The defendants assert that because Wachovia is not a party to the warrant, it cannot enforce the arbitration clause. The court agrees.

In certain circumstances, "a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int' l. Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000). The court considers the following "five theories arising out of common law principles of contract and agency law [to] provide a basis for binding nonsignatories to arbitration agreements; (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Id.* (internal quotations omitted). Wachovia broadly states that it is entitled to enforce the warrant's arbitration provision as a nonparty, but fails to establish whether it was incorporated into the warrant by reference, assumed Sandpiper's obligations, was in an agency relationship with Sandpiper, was the alter ego of Sandpiper, or that the defendants are estopped from arguing that Wachovia is not entitled to enforce the warrant's arbitration provision. After review, the court finds that Wachovia is not entitled to enforce the arbitration provision contained in the warrant. Therefore, Wachovia's petition for an order of arbitration and motion to compel arbitration are denied as to the arbitration clause contained in the warrant.

It is therefore

ORDERED that Wachovia's petition for an order of arbitration and motion to compel arbitration are denied.

IT IS SO ORDERED.

/s/ HENRY M. HERLONG, JR.
UNITED STATES DISTRICT JUDGE

GREENVILLE, SOUTH CAROLINA
AUGUST 1 , 2003

United States Court of Appeals
For The Fourth Circuit

WACHOVIA BANK NATIONAL ASSOCIATION
Plaintiff-Appellant

v.

DANIEL G. SCHMIDT, III; PRAIG LLC;
DGS INVESTMENTS, INCORPORATED,
Defendants-Appellees

OFFICE OF THE COMPTROLLER OF THE CURRENCY
Amicus Supporting Appellant

No. 03-2061
CA-03-2005-6-20

Filed: January 28, 2005

On Petition for Rehearing
and Rehearing En Banc

Before the Court is the appellant's petition for rehearing with request for rehearing en banc. On the petition for rehearing before the panel, Judge King voted in favor of such rehearing, and Judges Luttig and Beezer voted against rehearing. Panel rehearing is thus denied.

An active judge having called for a poll of the Court on the appellant's request for rehearing en banc, such poll was conducted and failed to garner majority support of the active judges. Judges Wilkinson, Niemeyer, Michael, Motz, King, and Duncan voted in favor of rehearing en banc, whereas Judges Luttig, Williams, and Shedd voted against rehearing en banc. Chief Judge Wilkins, along with Judges Widener, Traxler, and Gregory, deemed themselves disqualified and did not participate.

Pursuant to the foregoing, the appellant's petition for rehearing and request for rehearing en banc is hereby denied.

Judge King wrote an opinion dissenting from the denial of rehearing en banc, which is filed herewith.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

KING, Circuit Judge, dissenting from denial of rehearing en banc:

I write again in this appeal to emphasize my view that it presents a question of "exceptional importance," warranting en banc consideration by this Court. *See* Fed. R. App. P. 35(a)(2). I subscribe to this position for several compelling reasons: (1) the decision of the panel majority is incorrect; (2) the panel decision has created a circuit split on the question of whether a national banking association is entitled to invoke diversity jurisdiction in the federal courts on the same terms as corporations and state banks; and (3) our panel decision results in immediate injury to those national banking associations that litigate in the five states and nine districts of this Circuit by circumscribing their access to the federal court system. As explained herein, and also premised on my earlier dissenting opinion, *see Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 432-40 (4th Cir. 2004) (King, J., dissenting), I dissent from the denial of en banc consideration of this appeal.

As an initial point, although a majority of the participating active judges of this Court support en banc rehearing in this case, Wachovia has nonetheless, because of the anomaly of Rule 35(a), lost on the poll of the Court. *See* Fed. R. App. P. 35(a) ("A majority of the circuit judges who are in regular active service may order that an appeal . . . be heard or reheard by the court of appeals en banc."). While six of our thirteen active judges have voted in favor of en banc rehearing, only three have voted to deny en banc consideration (the remaining four active judges deemed themselves disqualified). The six judges voting in favor of en banc rehearing, however, fail to constitute a "majority of the circuit judges who are in regular active service" under Rule 35(a). *See* Local Rule 35(b) (defining "majority," for purposes of en banc poll, as majority of active judges "without regard to whether a judge is disqualified"). Although the public will likely per-

ceive this outcome to be more than passing strange, we are bound by the applicable procedural rules.

With all respect to our distinguished colleague Judge Luttig, who authored the opinion of the panel majority, and to our distinguished visiting colleague from the Great Northwest, Judge Beezer, who joined in that opinion, I see their conclusion as wrong. Put simply, diversity jurisdiction is present in this case. Section 1332(a)(1) of Title 28 provides the district courts with original jurisdiction over suits between citizens of different states involving more than $75,000. As the panel majority recognized, Wachovia's citizenship, and thus the presence of diversity jurisdiction, turns on the meaning of "located" in § 1348 of Title 28 (providing that national banks are "citizens of the States in which they are respectively located"). In this case, the defendants are citizens of South Carolina; plaintiff Wachovia is, under the proper assessment of § 1348, located in North Carolina (the principal place of its business); and diversity jurisdiction is thus present. *See Wachovia Bank*, 388 F.3d at 433 (King, J., dissenting).

As I explained in my earlier dissenting opinion, the panel majority's conclusion that the term "located" also includes Wachovia's branch offices in South Carolina is incorrect. The term "located," as used in § 1348, is ambiguous. *See* 388 F.3d at 434 (King, J., dissenting). Because a national bank is an artificial and abstract entity created by statute, it can be "located" in a broad range of places, and our resort to dictionaries to ascertain the statutory meaning of the term is unavailing. Congressional intent is thus implicated on the issue of what "located," as used in § 1348, means. *See id.* at 434-35 (King, J., dissenting). Importantly, Congress has never sought to relegate disputes involving national banks to the state courts. Congress has, to the contrary, consistently intended to provide national banks with the same access to the federal courts as that accorded corporations and state banks.

See Id. (King, J., dissenting). And the Supreme Court has recognized and enforced congressional intent on this point. *See Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 566 & n.22 (1963); *Herrmann v. Edwards*, 238 U.S. 107, 117-18 (1915); *Petri v. Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 649-51 (1892); *Leather Mfrs.' Bank v. Cooper*, 120 U.S. 778, 780-81 (1887).

Indeed, the three courts of appeals that have faced the question posed in this appeal have agreed with the position espoused in my earlier dissenting opinion. *See Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) (holding that "a national bank is not 'located' in, and thus not a citizen of, every state in which it has a branch"); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001) (holding that "located' should be construed to maintain jurisdictional equality between national banks and state banks and other corporations"); *Am. Surety Co. v. Bank of Cal.*, 133 F.2d 160 (9th Cir. 1943) (explaining that if Congress had intended for national banks to be deemed citizens of states where they operate branch offices, "it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent"). Each of those courts construed the term "located" to provide national banks with the same access to the federal courts as that accorded corporations and state banks. The panel majority has thus — in my view, unnecessarily — created a circuit split on this important question.

In sum, the decision of the panel majority has misconstrued the meaning of the term "located" in § 1348; it has contravened congressional intent on this question; and it has created a circuit split where none previously existed. And, paradoxically, our decision may well contravene the view of the majority of the participating active judges of this Court. Our failure to accord en banc consideration to the exceptional question presented in this appeal ignores the disruptive con-

sequences our decision is likely to visit upon national banks, whose access to the federal courts in this Circuit has now been severely circumscribed. This is an unfortunate result, the panel decision plainly warrants en banc rehearing, and I respectfully dissent from its denial.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

6500 CHERRY WOOD LANE
GREENBELT, MARYLAND 20770
301-344-0632

MEMORANDUM

TO: Counsel of Record

FROM: Judge Peter J. Messitte

RE: *Coots, et al. v. Wachovia, et al.*
Civil Case No. PJM 03-705

DATE: February 11, 2005

*****

The Fourth Circuit has recently remanded this case "for a determination of whether there is diversity jurisdiction in this case." *Coots, et al. v. Wachovia Securities, Inc., et al.*, 2004 U.S. App. LEXIS 25554 (4th Cir., December 4, 2004).

This case was removed from the Circuit Court for Montgomery County, Maryland on March 14, 2003. Plaintiffs amended their Complaint to add Wachovia Bank, N.A. as a Defendant, invoking the diversity jurisdiction of this Court under 28 U.S.C. § 1332. The Court denied Defendants' Motion to Enforce Arbitration Agreement on December 15, 2003, which Defendants appealed to the Fourth Circuit. On July 21, 2004, the Court ordered this case to be Administratively Closed pending the outcome of the appeal, but retained jurisdiction "in the event the parties wish to continue litigation following resolution of their appeal and/or arbitration."

It appears that this Court does not have jurisdiction over this action. Coots is a citizen of Maryland. Wachovia Bank, N.A., is a citizen of every state in which it operates branch offices. 28 U.S.C. § 1348; *Wachovia Bank, N.A. v. Schmidt, et al.*, 388 F.3d 414 (4th Cir. 2004). The Court has received

the Parties' correspondence of February 10, 2005, which notes that "[i]n the interests of judicial economy, please be advised that while Wachovia Bank's principal place of business is in North Carolina, it does have branch offices in Maryland."

Since 28 U.S.C. § 1332(a) requires "complete diversity between the real and substantial parties in interest," and such requirement is lacking in this case, the Court hereby DISMISSES this action and REMANDS the case back to the Circuit Court of Montgomery County, Maryland.

The Clerk of the Court is directed to CLOSE this case.

Despite the informal nature of this ruling, it shall constitute an Order of Court and the Clerk is directed to docket it accordingly.

/s/ PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

cc: Court File

NO. 03-2061

IN THE UNITED STATES
COURT OF APPEALS
FOURTH CIRCUIT

WACHOVIA BANK, N.A.
Plaintiff/Appellant,

vs.

DANIEL G. SCHMIDT III, ET AL.,
Defendants/Appellees

BRIEF AMICUS CURIAE OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF PLAINTIFF WACHOVIA BANK, N.A.'S PETITION FOR REHEARING AND REQUEST FOR REHEARING EN BANC

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BRIEF AMICUS CURIAE OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF PLAINTIFF WACHOVIA BANK, N.A.'S PETITION FOR REHEARING AND REQUEST FOR REHEARING EN BANC

The Office of the Comptroller of the Currency ("OCC"), the bureau within the Department of Treasury charged with the administration of the National Bank Act, 12 U.S.C. §§ 1, *et seq.*, and supervision of national banks, including Plaintiff Wachovia Bank, N.A., Charlotte, North Carolina (the "Bank"), files this brief amicus curiae in support of the Bank's Petition for Rehearing and Request for Rehearing en Banc. The Bank's Petition was filed November 15, 2004.

I. Interest of Amicus Curiae

As part of its supervisory responsibilities, the OCC determines, inter alia, whether to charter a national bank, to appoint a conservator or a receiver for a national bank, to take administrative enforcement action for violations of law and "unsafe and unsound" banking practices, and whether to approve various changes to a national bank's corporate structure, including applications to branch, merge, or relocate. *See, e.g.*, 12 U.S.C. §§ 21, 27, 30, 36, 191, 203, and 1818. The OCC's "task of preserving public confidence in the financial institutions of this nation is vital to our economic future." *The First Nat'l Bank of Gordon v. Department of the Treasury*, 911 F.2d 57, 62 (8th Cir. 1990).

The question of a national bank's citizenship for purposes of diversity jurisdiction raises an issue of exceptional importance that affects the ability of national banks and those who litigate against them to vindicate their rights in federal court. As the federal agency responsible for supervising national banks and ensuring the safety and soundness of the national banking system, the OCC has an institutional interest in any

judicial decision that curtails the rights of national banks and adversely affects their operations.

By denying national banks access to a federal forum on the same terms as other corporate entities, the majority opinion not only creates a conflict among the U.S. circuit courts of appeals, but it places national banks at a competitive disadvantage as to state chartered banks and other lenders with which national banks compete. The Court's decision would require dismissal of cases involving national banks that are pending in federal district courts throughout the Fourth Circuit based on a new rule for determining national bank citizenship that is at odds with the acknowledged purpose of over 100 years of congressional action affecting national bank access to federal court. At a minimum, this Court's decision would impose delay and costs on those litigants whose cases must be dismissed and brought, if possible, in state court. The restriction of the ability of national banks to come into federal courts to vindicate their rights and the consequent disruptions to their operations are of great concern to the OCC.

The question of the Bank's citizenship under 28 U.S.C. § 1348 arose for the first time during oral argument. Consequently, the OCC had no notice that this issue was before the Court and had no opportunity to appear as amicus curiae and file a brief in accordance with Fed. R. App. P. 29 to present its views on this issue. Given the importance of this question, the OCC files this brief amicus curiae in support of the Bank's Petition for Rehearing and Request for Rehearing en Banc.

II. The Grounds for Granting Wachovia's Petition for Rehearing and Request for Rehearing En Banc Are Met

Under Fed. R. App. P. 35(a)(2) and Local Rule 40(b) of this Court, the panel's interpretation of 28 U.S.C. § 1348 to

mandate that a national bank is a citizen of every state in which it has a branch office, slip. op. at 2, involves a question of "exceptional importance."

A proceeding presents a question of exceptional importance if it involves an issue on which the panel decision "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Such is the case here. Until now, virtually all circuit courts of appeals that have addressed the issue of a national bank's citizenship under section 1348[1] have concluded that the term "located" refers, at most to two states: the state in which the national bank has its main office[2] and the state of the bank's principal place of business.

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[1] As noted by Judge King in his dissent, slip. op. at 68 n.5, the Second Circuit has recently indicated that, under section 1348, a national bank should be deemed "a citizen of every state in which it has offices." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) (*dicta*). The decision upon which that panel relied, *United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (*per curiam*), did not *hold* that "located" includes a national bank's branch offices; it simply remanded for an assessment of citizenship.

[2] In *Firstar*, the Seventh Circuit explained that, in order to maintain jurisdictional parity between national banks and state banks or other corporations, national banks would need to be citizens of potentially two different states. This was because 28 U.S.C. § 1332(c)(1) provided that a state corporation, including a state bank, is a citizen of its state of incorporation and the state where it has its principal place of business. 253 F.3d at 993-94. Concluding that the state listed in a national bank's organization certificate is analogous to the state of incorporation for a state chartered corporation, the *Firstar* court held that a national bank was located for purposes of section 1348 in the state listed in its organization certificate and the state where it had its principal place of business. *Id.* at 994.

These courts have rejected the interpretation that "located," as used in section 1348 properly includes any state in which a national bank operates a branch office. *Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); *American Surety Co. v. Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943).

The Advisory Committee's Notes indicate that it is appropriate to grant rehearing *en banc* when a panel decision *creates* a conflict among the circuits. *See* Fed. R. App. P. 35 advisory committee's notes, 1998 Amendments. "Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated." *Id.* By granting the Bank's petition for rehearing, this Court will be able to follow Justice Frankfurter's advice that the "most constructive way of resolving conflicts is to avoid them." *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

The panel's decision interpreting 28 U.S.C. § 1348 has wide-ranging implications for questions of practice and procedure going beyond the effect on the parties to this particular case, a further basis for granting rehearing. *See, e.g.*, *California Medical Ass'n v. Federal Election Comm'n*, 641 F.2d 619, 632 (9th Cir.), *aff'd*, 453 U.S. 182 (1980) (*en banc* review appropriate because decision affected all entities defined as political committees under the Federal Election Campaign Act); *F&M Schaefer Brewing Company v. United States*, 236 F.2d 889 (2d Cir. 1956), *rev'd on other grounds*, 356 U.S. 227 (1958) (*en banc* review granted where the court's construction of the federal tax code to require dismissal of government's appeal could affect other cases). As explained above, the panel decision will have a profound effect upon litigation involving national banks in the Fourth Circuit. It will cause all litigants, regardless of the stage of the litigation, to lose the protection of a federal forum for

state law claims involving a national bank if that bank has a single branch in a state where any opposing party is a citizen.

Ultimately, rehearing is appropriate because the panel's determination that the term "located" unambiguously encompasses interstate branch locations departs from over 100 years of congressional action regarding federal court jurisdiction for national banks and consistent Supreme Court interpretation.[3] Review is "indicated whenever it seems likely that a majority of all the active judges would reach a different result than the [original] panel . . . .", *Western Pacific Railroad*, 345 U.S. at 270 (Frankfurter, J., concurring), or that "special circumstances and important implications" may justify en banc consideration. 345 U.S. at 261. As explained below, because legislation affecting national bank access to federal courts has the consistent congressional purpose of putting national banks on the same footing as state banks and corporations for purposes of diversity jurisdiction, the panel decision should be reviewed so that this Court can give effect to the intent of Congress.

III. Rehearing is Required to Properly Construe Section 1348

A. The Term "Located" is Ambiguous

The majority holding that the term "located" includes Wachovia's branch offices in South Carolina is incorrect, and proceeds from the majority's erroneous conclusion that the term "located," as used in section 1348, is "unambiguous." Slip op. at 5. No other court of appeals has found the meaning of "located" in section 1348 to be so clear as to preclude any ambiguity regarding its interpretation for purposes of that statute. Indeed, three other courts of appeals have explicitly

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[3] *Financial Software Systems, Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 599 (E.D. Pa. 1999).

or implicitly rejected that conclusion. The majority's conclusion is possible only by discounting the history of legislation in this area and judicial precedent, which are indispensable to a correct understanding of section 1348, in favor of formulaic application of general principles of statutory construction. It is only by reference to this legislative history, as demonstrated by a succession of Supreme Court decisions, that the congressional intent[4] behind the jurisdictional statutes governing national bank access to federal courts, including section 1348, can be determined.

As the Supreme Court recognized in *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35, 44 (1977), "there is no enduring rigidity about the word 'located,'" and the Court found the word to be ambiguous. *See Horton*, 387 F.3d 426, at *6; *Financial Software*, 84 F.Supp.2d at 598 ("the term 'located' is not a term of art in the law"). Moreover, as the dissent recognizes, slip op. at 60, a statutory term must be deemed ambiguous, if, when examined in context, it is susceptible to more than one reasonable interpretation. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 250 (4th Cir. 2004), quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). *See also Smiley v. Citibank*, 517 U.S. 735, 739 (1996) (In light of three differing court interpretations of the term "interest" as used in the National Bank Act, "it would be difficult indeed

[4] The majority acknowledges that a policy granting national banks access to federal courts on the same terms as state banks and other state corporations "may be preferable," and suggests that its decision may stimulate Congress to legislatively reverse the panel's decision by amending section 1348, slip op. at 27. The majority's observation, however, fails to recognize that the policy choice made by Congress, and annulled by the majority's construction of the statute, was to ensure parity between national banks and state banks with respect to their access to federal courts.

to contend that the [term] is unambiguous with regard to the point at issue here."). If a term is ambiguous, the reviewing court must "seek to determine the construction intended by Congress." *See Newport News Shipbldg & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir. 2004).[5]

B. Congress Intended National Banks to Have Access to the Federal Courts on the Same Terms as State Banks and Corporations

It is no accident that the courts of appeals, until the majority opinion, have interpreted section 1348 as mandating that a national bank is a citizen of at most two places: the state in which its main office is located and the state in which it has its principal place of business. For over 100 years, the Supreme Court has explained that Congress adopted the statutes governing national bank access to federal courts to give federal courts jurisdiction over claims involving national

[5] According to the majority's analysis, the unambiguous terms "established" and "located" in section 1348 have different meanings and "located" necessarily includes locations where national banks operate branches. Slip op. at 12-15. This conclusion is not mandated by the statutory language and cannot be squared with the history of the provisions in which these terms appear. Indeed, other courts have found that the terms are in fact synonymous. One federal court construing these terms concluded that a national bank is both "established" and "located" only at the place specified in its organization certificate. *Mfr.'s Nat'l Bank v. Baack*, 16 F. Cas. 671, 673 (C.C.S.D.N.Y. 1871). *See also Financial Software*, 84 F. Supp. 2d at 604 (the words "established" and "located" date back to the Act of 1882, at which time they were "functionally synonymous because national banks had no branches."). In fact, the Supreme Court used the terms interchangeably in 1947, observing that a national bank is a "citizen" of the state in which it is "established or located, and in that district alone can it be sued." *Cope v. Anderson*, 331 U.S. 461, 467 (1947).

banks on like terms as state banks and corporations. *Financial Software*, 84 F. Supp. 2d at 599.

This "parity" principal is extremely important to a proper understanding of the term "located" in section 1348. If, as the majority concludes, national banks were to be deemed citizens of all states in which they operate branches, it would place them in a less favorable position vis-a-vis state banks and corporations, whose access to federal court diversity jurisdiction is governed by 28 U.S.C. § 1332(c)(1). In short, "a national bank would enjoy access to diversity jurisdiction only when sued by or suing a citizen of a state in which the bank maintains no branch at all. Corporations and state banks do not have such a limited access to federal court." *Horton*, 387 F.3d 426, at *17.

When Congress authorized creation of the first national banks in 1863, it provided that suits by and against them could be initiated in the federal courts, which was interpreted as requiring all suits against national banks to be bought in federal court. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 681; *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892). In 1864, Congress provided that suits against national banks could be brought in "any state, county or municipal court . . . having jurisdiction in similar cases." National Bank Act of 1864, § 57, 13 Stat. 99, 116-17 (1864). Congress acted in 1882 to put national banks on the same footing with respect to access to federal courts as state banks in like situations. *See Leather Mfrs.' Nat'l Bank v. Cooper*, 120 U.S. 778, 780-81 (1887).

The statute Congress enacted in 1882 provided that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." This amendment "was evidently intended to put national banks on the *same footing as the banks of the state where they were located* for all the purposes of the jurisdiction of the courts of the United States." 120 U.S. at 780 (emphasis added). *See also Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 566 (1963) (The 1882 Act "sought to limit, with exceptions, access of national banks to and their suability in, the federal courts to the same extent to which non-national banks are so limited."). *See also Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might.").

This principal of parity is embodied in all legislation governing national banks' access to federal courts and is essential to a correct interpretation of section 1348.[6] As the Seventh Circuit has explained:

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[6] If, in 1911 or 1948, Congress had intended to alter the result that national banks have the same access to federal courts that state banks and corporations have, Congress would have used specific language to achieve that result. But it is difficult to imagine that Congress had any fixed idea about the citizenship of a national bank except that a national bank would be treated as a citizen of the one place where it had its principal place of business. In 1911, Congress had not authorized general branching by national banks although some national banks had branches that they retained after they converted from state banks. Moreover, while all national banks were granted limited authority to branch within the same state by the McFadden Act in 1927, that branching authority did not permit a national bank to establish a branch in a different state. Thus, the Congress that enacted the jurisdictional statute in 1911 could not have contemplated that the term located would encompass national bank branches. Certainly, if Congress had intended to make a national bank's citizenship, and its access to federal court, dependent upon the location of the bank's branches, Congress would have made some affirmative change to the jurisdictional statutes in 1948 to reflect that change. This would be particularly true given that the Ninth Circuit had specifically held

> [P]rinciples of statutory construction weigh heavily in favor of construing "located" in 28 U.S.C. § 1348 to refer to a more limited number of states than wherever the bank has a branch. Statutory words or phrases ambiguous in their common or contextual definitions can achieve settled meaning through judicial interpretation. If a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old.

Firstar, 253 F.3d at 988, citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), and *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Moreover, "the courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version." *Id.*, citing *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 562 (1991). *See also* slip. op. at 64-65 (King, J., dissenting).

C. The Court Should Construe Section 1348 to Implement Congressional Intent Regarding Federal Court Jurisdiction Over Suits Involving National Banks

The detailed historical and legislative analysis conducted by the Fifth and Seventh Circuits and to a lesser extent by the Ninth Circuit informs their uniform construction of section 1348. That analysis led to the same conclusion reached by the dissent in this case: Congress has "consistently intended

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in *American Surety* in 1943 that a national bank is not a citizen, for purposes of diversity jurisdiction, of the states where it operates interstate branches, based on language in the 1911 statute that is virtually identical to section 1348.

to provide national banks with the same access to the federal courts as that accorded state banks and corporations . . . [and] has never sought . . . to relegate disputes involving national banks to the state courts." Slip. op. at 57 (King, J., dissenting). *See also American Surety Co. v. Bank of California*, 44 F. Supp. 81, 83 (D. Or. 1941), *aff'd*, 133 F.2d 160, 162 (9th Cir. 1943). Until the majority decision here, no federal appellate court had quarreled with this conclusion.

In *Firstar*, the Seventh Circuit focused squarely on the issue this way: "The 1882 Act established that national banks could take advantage of federal jurisdiction to the same extent as state banks, as expressed in *Cooper*. This same basic interpretation carried over to the 1887 Act, which *Petri* interpreted as placing national banks in the same position regarding federal jurisdiction as corporations." 253 F.3d at 988. Further, "[w]hen Congress enacted 28 U.S.C. § 1348 in 1948, this principle of equal jurisdictional access had been established and followed by the courts for over sixty years." *Id.* It is plain, therefore, that Congress enacted section 1348 "against a backdrop of equal access to the federal courts for national banks, state banks, and corporations." *Horton*, 387 F.3d 426, at *11. As the Fifth Circuit concluded,

> We are persuaded that this goal of jurisdictional parity is best served by interpreting "located" as referring to a national bank's principal place of business as well as the state specified in the bank's articles of association. Since a state bank, under 28 U.S.C. § 1332(c)(1), may be a citizen of no more than two states - the state where its principal place of business is located and its state of incorporation - maintaining jurisdictional parity between a national and state bank requires that the national bank have no more than two possible states of citizenship.

Horton, 387 F.3d 426, at *13, quoting *Firstar*, 253 F.3d at 993.

By ignoring the intent of Congress, the majority opinion constructs a jurisdictional regime that denies national banks, and those that litigate against them, access to federal courts and the protections that flow from this Constitutionally-authorized forum for litigants from different states. Congress has never acted to deny national banks the same protections afforded to state banks and other corporate entities by the diversity jurisdiction of the federal courts. The decision by a divided panel of this Court that denies national banks these protections is based on a improper construction of section 1348 and requires correction.

IV. Conclusion

For all the foregoing reasons, the OCC urges this Court to grant the Bank's petition for rehearing in this matter.

Respectfully submitted,

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